WORKERS' COMPENSATION ACT REVIEW

Options for Legislative Changes to Yukon's Workers' Compensation Act

Yukon
Government

2006

106-03759/

Message from the Chair

Thank you for your interest and involvement in the review of the *Yukon Workers' Compensation* act. Your continued participation is essential in addressing how the Act should be amended to best serve the needs of all stakeholders.

After carefully examining the many Issues that the stakeholders and other interested parties put forward and receiving comments on them, the Panel has produced this Options Paper. This paper provides a discussion of each of the issues brought forward and identifies options for addressing them.

The issues have been grouped into four general categories: Governance, Assessments, Benefits, and the Appeals Process, Policy and Legal Issues. To facilitate mapping of the issues to the Discussion Paper, each item has the corresponding issue number from the Discussion Paper in brackets in the title of the issue.

The Panel would like to hear your input, comments and considerations. Do you think an issue needs to be addressed by a change to the legislation? Do you agree with one of the options presented? Do you have other options that you would like the panel to consider?

The Panel has been tasked with providing the Minister with recommendations for changes to the legislation. And while the Panel recognizes that there may be other solution and other ways of resolving the issues, such as changes to current practices or policies, it is outside of the scope of the Panel to make such recommendations.

You may make your comments at public meetings to be held in March, April and May and you may submit your comments in writing to: Workers' Compensation Act Review Panel, Box 2703 Whitehorse, Yukon, Y1A 2C6 or by email at wcbactreview@gov.yk.ca. Dates and locations of the meetings will be announced. The deadline for final written submissions is June 15, 2006.

Thank you for your continued participation.

Patrick Rouble
Chair
Workers' Compensation Act Review Panel

- Message from the Chair ... 2
- INTRODUCTION ... 8
- GOVERNANCE ISSUES ... 12
  - Issue # 1 Entire governance structure (57) ... 12
  - Issue # 2 Voting and role of the Chair (58) ... 16
  - Issue # 3 Relationships between the Appeals Tribunal and the Board (62) ... 17
  - Issue # 4 Links between the powers/duties of the board and the objects of the Act (60) ... 18
  - Issue # 5 Reporting structure of the President (61) ... 21
  - Issue # 6 Processes for appointment to the Board and the Appeal Tribunal (64) ... 22
  - Issue # 7 Board policy developments (emerging Issues, are policies current?) (65) ... 25
  - Issue # 8 Consultation process on policy development (66) ... 25
  - Issue #9 Disclosure of financial/management information (70) ... 27
  - Issue # 10 Annual reporting of the Board and the President to the Legislative Assembly (67) 30
  - Issue # 11 Releases of the annual report and the financial statements (68) ... 31
  - Issue # 12 Consistency of scheduling the annual information meeting (69) ... 32
  - Issue #13 Promotions of WCB and occupational health and safety programs and accident prevention strategies (71) ... 33
  - Issue #14 The effectiveness and appropriateness of the Board administering both the Workers Compensation Act and Occupational Health and Safety (OH&S) (73) ... 33
  - Issue #15 Administration costs (75) ... 36
  - Issue # 16 Attraction and retention of key personnel (76) ... 40
- ASSESSMENT ISSUES ... 42
  - Issue #1 Access to information on which individual assessment rate is based and calculated and rationale for any change to assessment rates (46) ... 42
  - Issue # 2 Distribution of administration costs to industry classifications (47) ... 42
  - Issue # 3 Equal treatments for all employers (59) ... 47
- BENEFITS ISSUES ... 50
  - Issue # 1 Age limitation of claimants (2) ... 50
  - Issue #2 How government consents to/accepts responsibility for volunteers (3) ... 52
  - Issue # 3 Terminations of benefits (4) ... 53
  - Issue # 4 Benefits during appeal period (5) ... 54
  - Issue # 5 Limitation periods (9) ... 56
  - Issue # 6 Commuting benefit payments (23) ... 57
  - Issue #7 Awards for pain and suffering (24) ... 59
  - Issue # 8 Maximum non-economic loss awards (25) ... 60
  - Issue # 9 Compensation for loss of personal property – amount (26) ... 62
  - Issue # 10 Compensation for loss of personal property – triggers (27) ... 63
  - Issue #11 Pay on day of injury (28) ... 64
  - Issue # 12 Claims costs (74) ... 65
  - Issue # 13 Calculation of wage loss benefits (29) ... 67
  - Issue # 14 Average weekly earnings (86) ... 69
  - Issue # 15 Earnings (87) ... 71
  - Issue #16 Vocational rehabilitation benefits: should they be based on s. 36 or s.37? (30) ... 72
  - Issue #17 Different minimum compensation levels (33) ... 73
  - Issue #18 Minimum compensation levels (34) ... 75
  - Issue #19 Annuities (35) ... 76
  - Issue # 20 Rehabilitation assistance for incidental costs (37) ... 78
  - Issue # 21 Maximum wage and assessable earnings rates (82) ... 79
- APPEALS PROCESS, LEGAL AND POLICY ISSUES (1-24) ... 82
  - Issue #1 Process to lodge administrative complaints (1) ... 82
  - Issue #2 Recourse to review Worker's Advocate decisions under s. 13 (3). (7) ... 84

Issue #3 Decisions must be in keeping with Act and policy (10) 85

Issue #4 Processes for dealing with new evidence (11) 87

Issue # 5 Mediation as an effective method for primary dispute resolution (12) 90

Issue # 6 Administration's standing at hearings (13) 91

Issue #7Jurisdiction of Appeal Tribunal (20) 92

Issue #8 Employer's appeal process (51) 92

Issue # 9 Application to the Supreme Court (21) 94

Issue #10 Standing at assessment hearings (50) 95

Issue #11 Annual reporting of Worker's Advocate (8) 96

Issue #12 Annual reporting of the of the Appeal Tribunal, Workers' Advocate and Employer Consultant (63) 97

Issue #13 Board's notice to employers of a claim for compensation (6) 98

Issue #14 Processes for release of claims information (14) 100

Issue #15 Access to claim file – (documents in respect of their claim) (15) 100

Issue #16 Implementation of Appeal Tribunal decision – timeframe for (16) 102

Issue #17 Term "adjudicator" in legislation (17) 103

Issue #18 Choice of gender of medical consultant (18) 104

Issue #19 Board's ability to seek clarification of Appeal Tribunal decisions (19) 105

Issue #20 Return to work and employer's obligation to re-employ (22) 106

Issue #21 Uses of "deeming" (31) 111

Issue #22 Reimbursement of compensation payments to employers and other insurers (32). 114

Issue #23 Claims management (36) 116

Issue #24 Definition of initial treatment site (38) 117

APPEALS PROCESS, LEGAL AND POLICY ISSUES (25-48) 119

Issue #25 Roles and use of indexing of benefits (39) 119

Issue #26 Adequacy of the system for spouses (40) 121

Issue #27 Limitation of legal rights as they relate to vehicles (41) 124

Issue # 28 Definition of a vehicle (83) 124

Issue #29 Division/control of subrogated claims (42) 127

Issue #30 Compensation Fund within the Yukon Consolidated Revenue Fund (43) 131

Issue #31 Financial Administration Act (FAA) and independence of the Board (44) 131

Issue #32 Authority over the Fund (45) 131

Issue #33 Access to employer's safety and claims cost information (48) 135

Issue #34 Incentive programs (49) 136

Issue #35 Process for collection of assessment and 138

penalties for late or non-reporting (52) 138

Issue #36 Processes for dealing with fraud (53) 140

Issue #37 ATIPP (Access To Information and Privacy Protection) (54) 141

Issue #38 Employer education and representation/ Employer's Advocate/Consultant (55) 142

Issue #39 Worker education and representation/ Worker's Advocate (56) 142

Issue #40 Limitation periods for appeals to the Appeal Tribunal and to the Board (72) 145

Issue #41 Employee's right to sue the Board for damages caused or exacerbated by the Board's actions (77) 147

Issue #42 Administering prior years' legislation, policy or orders (78) 149

Issue #43 Access to the Board's independent legal opinions (79) 151

Issue #44 Definition of disability: including chronic pain and chronic stress (80) 152

Issue #45 Disability vs. impairment (81) 152

Issue #46 Definition of compassion (84) 160

Issue #47 Definition of wholistic approach to rehabilitation (85) 161

Issue #48 Special examinations/reviews (88) 163

Appendix A: Weekly Benefits for Temporary Disability Summary 2003 and 2005 166

Appendix B: Summary of Experience Rating Programs in Canada 168
Appendix C: Compilation of Definitions from Canadian Workers' Compensation Legislation
.... 171

INTRODUCTION

What is the origin of the system for workers compensation in Canada?
In the early 1900's the idea of workers' compensation was getting attention in the entire industrialized world. Studies done in both the USA and Europe showed that under civil law of the time, only 20% to 30% of injured workers had a legal case for compensation in the courts. Few workers pursued legal action due to the high cost and the deep pockets of their primary opponents; however the growing number of suits against employers and in some cases co-workers was cause for concern.

In 1916 Sir William Meredith, Chancellor of the University of Toronto, was commissioned by the Ontario Government to develop a system for workers compensation. Meredith examined both the German and British models and recommended a system based on a series of principles and requiring an agreement between employers and workers which became known as the "historic compromise". Employers agreed to share financial responsibility for injured worker's benefits through a system of collective liability and in return receive protection from lawsuits arising from work-related injuries and diseases. Workers in exchange for giving up the right to sue employers or their co-workers receive the right to benefits for work-related injuries and diseases on a no-fault basis. Meredith proposed that the cost of workplace injuries, diseases and deaths should remain as a work-related cost and not burden the workers family and society in general.

Meredith's six principles are as follows:

1. The liability of employers for injuries in the workplace should be collective, rather than individual, with employers paying into a central fund used to pay benefits to injured workers.
2. The benefits payable to injured workers must be guaranteed in the legislation.
3. In return for guaranteed compensation, workers have no legal right to sue their employer or co-workers for negligence resulting in a workplace injury. This is the "historic compromise" of the workers' compensation system.
4. The workers' compensation system is a no-fault system.
5. The system should be administered by a body independent of government with equal representation from labour and industry and a neutral chair.
6. The Board must have judicial-like authority for making final decisions on claims for compensation, without an appeal to the courts.

Who are the participants in the system?
Other than Government, which determines through the enactment of legislation the parameters of the system in terms of entitlements and obligations, there are three primary participants in workers compensation. These are workers, employers and the Board. The Workers are the recipients of the benefits as set out in legislation. Employers are responsible for funding the system. And the Yukon Workers Compensation, Health and Safety Board is responsible for the administration, adjudication and enforcement of the entitlements and obligations set out in the legislation and is independent from all other participants of the system. Board decisions are independent and those of a 3rd party.

The Appeal Tribunal, which is external to and independent from the board, provides final and binding decisions on decisions of the board under subsections 8(1), 20(1) and 27(4) of the Act. As such the Issues should be considered from three perspectives – entitlement, cost and administration.

The conundrum facing the whole workers' compensation system is that benefits should be determined based on fairness to a workers' needs versus the amount of premiums that employers can bear

Entitlement – A fundamental principle of workers compensation is that the worker will receive "fair", not necessarily "full", compensation benefits for a disability which arises out of or occurs in the course of employment. [1]

Costs – The system must be financially viable. That is, the level of entitlement for workers must be balanced against the cost to employers. Considering the benefits provided and the costs experienced in other Canadian jurisdictions is one means of assessing any proposed changes to worker entitlements in the Yukon.

Administration – Any change to the system should strive to add clarity for all stakeholders and whenever possible ease the administrative burden or minimally effect the current administrative burden.

Although the system has many identifiable components (compensation, assessments, prevention, governance, and appeal tribunal) they are all interrelated parts of an overall system and as such each component must work effectively with the others. When an Issue is considered and change to one component of the system is proposed then the impact of the change on all component parts must be considered.

Similarly, an injured worker's compensation has many inter-related components – such as temporary wage loss, vocational rehabilitation, permanent wage loss and a lump sum payment for non-economic loss. The impact of changing one or more of these components must be considered in the context of the overall objective of providing fair compensation.

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[1] Ref: B.C. Legislation and Policy review 2002

Nationally it is generally accepted that ten percent of the injuries are serious and that these ten percent represent 85-90% of the total cost to the system.

In 1995, the Australian Industry Commission found that injuries with increased severity had a significant level of indirect costs associated with the workers incapacity. The Commission determined that 1/3 of the "true" cost of severe workplace injuries is direct cost and borne by the compensation system and 2/3 is an indirect cost to the employer, the worker and the community. The indirect cost was determined to be apportioned as follows: 30% to the worker, 40% to the community and 30% to the employer. Since the employer also pays the direct costs through compensation premiums, the employer's portion of the "true" cost of the severe injuries is just over 50%.

The Yukon Workers Compensation Health and Safety Board (YWCHSB) is an independent authority created by the *Workers Compensation Act*. The board has responsibility for adjudicating claims when an occupational injury, disease or death has occurred and administering benefits to workers and their surviving entitled dependents. Additionally, the board is responsible for the administration and enforcement of the Occupational Health and Safety regulations. With such a broad mandate, the YWCHSB touches every employer and every worker in the Yukon.

There were 88 Issues identified for consideration by the Review Committee. Many of the Issues are inter-related or interdependent making it difficult to examine changes in isolation of other component parts of the system. Stakeholders are cautioned that choosing to support a particular option for one of the Issues may have significant implications for other parts of the system. The options paper discusses the individual Issues under the major headings of Governance, Benefits, Assessments, and Appeals Process, Legal and Policy. However, because of the interconnection of subjects there is some duplication and overlap.

GOVERNANCE ISSUES

Issue # 1 Entire governance structure (57)

Background and Discussion

Governance is discussed under the following topics: Who is the Board; Board composition and size; Appointment of Board members; Board meeting frequency; Board roles and responsibilities; Board confidentiality; Board standard of care.

Efficiency and Effectiveness although listed as a concern under Issue 57 – Entire Governance Structure of the Discussion Paper - is covered under Issue #12.

The first objective of any successful system is that a strong, credible and stable governance structure be in place. Governance includes the structure and processes used to direct the affairs of an organization and provide oversight of management. [2] The governance structure also includes the governing body of the organization and its relationship to the other parts of the organization.[3]

The Bank of Montreal's motto for corporate governance states "providing good governance and ethical leadership is not about any one thing; rather, it's about ensuring that you have a comprehensive set of ethical principles, and the right team to make sure the business is run according to those principles. It means you must live up to a high and independently verifiable standard, taking nothing for granted."

Who is the Yukon WCHSB board governance?
In the Yukon, Part 11, section 106 of the Act defines who the "board" is. The terminology may be confusing to some readers since all of the duties in other parts of the Act are also assigned to the board - although in practice they are carried out by other board officers such as adjudicators. There is not a distinct name for the governing body as is found in some other Canadian legislation.[4] It might be clearer to readers if the Act provided the board governance with a distinct name such as the "Board of Directors" or "Board of Governors". The roles and responsibilities assigned to the Board could then be defined and thus all other duties outlined in the Act for the board would be those of the administration's officers and employees and provide a clear separation of duties.

Options

1. No change to legislation

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[2] Ref: B.C. Royal Commission Report – definition of governance.
[3] Alberta WCB Governance Manual
[4] Workers Compensation Act, British Columbia

2. Amend the legislation to rename the Board. Options include: Directors of the Board, Commissioners, or the Board of Governors.

Board Governance - size and composition

Overview

Part 11 subsection 106 (2) of the Act sets out the membership of the Yukon's Board governance as a Chair, no fewer than four and no more than six voting members representing workers and employers in equal numbers as well as the President and the Chair of the Appeal Tribunal as non-voting members. The legislation does not appear to provide a voting role for the Chair.

The Auditor General has suggested the addition of voting public interest representatives to the Board and also suggested removing the Appeal Tribunal Chair as a member. The legislation would have to be amended to provide these changes.

Size of the Board

The Yukon Board currently has seven members made up by two voting worker representatives, two voting employer representatives and three non-voting members – the Board Chair, the President and the Chair of the Appeal Tribunal.

In considering the number of persons making up Board governance it is important to consider that it should be large enough to achieve an effective balance such that the workload at the governance level is spread equitably among its members. However, the size should not be too large in order to ensure Issues before the Board can be dealt with in a timely manner.

In terms of size, the other WCB governing structures across Canada range from five to 15 members. (Five Boards have eight members or less, while the remaining six Boards have nine or more members). Surprisingly, the larger jurisdictions have fewer Board members.

Composition of the Board

The foundation of workers compensation was the "historic compromise " between workers and employers and as such there should be no question that workers and employers have a rightful claim to strong representation on the Board. Workers are the intended beneficiaries of the system and for the most part, employers pay for it.

However, the addition of public interest members that are drawn from professional disciplines or callings which are relevant to the system can ensure board governance has direct input of the expertise and knowledge it needs to meet statutory and fiduciary accountability and responsibility.

If public interest members are added the potential disciplines from which they might be drawn are persons with expertise or experience in: financial matters (such as an actuary); occupational medicine/community health; investment/money management; insurance and benefit plans; occupational health and safety.

Public interest governance members, as a cautionary measure, would have to be chosen so that they would not be perceived to be closely associated with either the worker or employer communities.

Although consensus decision making by the Board is the norm, the addition of public interest members would ensure that progress would not be stifled by a deadlock of opposing views. It does mean however, that the Chair might on occasion be required to cast the deciding vote. Minor additional cost of governance would be created over the short term.

With the exception of Quebec and the Yukon, all WCB Boards in Canada have public interest members. The most common governance model has equal numbers of representatives of workers, employers and public interest and depending on the jurisdiction there are either two or three of each. [5] A voting Chair and non-voting President bring the Board complements up to either 8 or 11 members.

The Province of Manitoba amended their legislation in April 2005 to set out that Board committees are established and their functions explained for audit, policy and planning and investment. A unique feature of the amendment is the provision for appointment of committee members who are not members of the Board.

Surprisingly, two of the larger provinces (Ontario and B.C.) have relatively small Boards and the worker and employer communities are not the predominant voting representatives. At these Boards the non-representational members and a voting chair outnumber the representational members. This step was reportedly taken in these jurisdictions to prevent the system from being paralyzed when employer and worker members become entrenched in their representational positions.

Regardless of the composition, the most successful governance structures strive for consensus decisions that are made in the best interest of the system.

Should the President be a Board Member?

The President is the most senior management position of the system and currently is a non-voting member. This gives him/her the opportunity to see first-hand what the Board is deciding and why, to have input into their decisions and for ensuring the decisions are implemented by the administration. Every WCB in Canada has their President as a non-voting member.

One of the Issues for the Yukon is that the President, because he/she is also a deputy head, reports to both the Board and the Minister. This reporting relationship although not unique to the Yukon is not the norm in Canada. Most WCB Boards in Canada have as one of their duties the selection and evaluation of a President who is directly accountable to them. In the Yukon this dual reporting is driven by subsections 116 (5) & (6) of the Act.

The overriding role of the board members is to be the stewards of the system and provide oversight. Their role is not to be involved in the day to day operation and management of the system.

Options

Size and Composition

1. No change to legislation

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[5] NWT/Nunavut has 2 of each. Alberta and Newfoundland have 3 of each.

2. Amend the legislation to allow the addition of 2 public interest members to the Board.
3. If public interest members are added, amend the legislation to reduce the number of employer and worker members to two each.
4. Amend the legislation so that the Chair of the Appeal Tribunal is removed as a member.
5. Add a requirement to the legislation stating that the Chair of the Appeal Tribunal shall attend Board meetings once each quarter.
6. Amend the legislation so that the President is a voting member of the Board.

Frequency of Board Meetings
Subsection 106 (12) of the Act requires the Board to meet at least once per month. This requirement is likely to ensure that the board is available to deal in a timely manner with OH&S and assessment appeals. Most other jurisdictions in Canada provide more flexibility to the Board and simply state the minimum number of meetings the Board must hold in a year. The norm seems to be a requirement for 10 per year.

Options

1. No change to legislation
2. Amend the legislation to set a minimum number of meetings per year as opposed to requiring a monthly meeting. This would alleviate the concern that the time commitments are too onerous and a hindrance to finding willing candidates.

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[13] Section 1(h) of the Act – the objects – is repeated here as a Board duty, providing a strong link between the Objects and Board duties.

Issue # 2 Voting and role of the Chair (58)

The Chair must enjoy the confidence of the labour and employer communities and be perceived as neutral, credible and competent and must be adept at forging consensus. The Chair must have the skills necessary to: preside at meetings of the Board; ensure its productive operation; facilitate and monitor the implementation of Board decisions; act as the Board spokesperson on broad policy matters and develop appropriate relationships with Government. These characteristics to be considered in appointing a Chair could be added to legislation or included in the Yukon Board's governance manual.

Although consensus decision making by the Board is the norm there may arise situations of gridlock. In such situations it is often the role of the Chair to cast the deciding ballot.

Options

1. No change to legislation
2. Amend the legislation so that the Chair is clearly a voting member
3. Amend the legislation so that the Chair is clearly **not** a voting member

Role of the Chair

In order to further define the role of the Chair the Act could be amended to include the following additional responsibilities:

1. Provide the leadership role with respect to the responsibilities to be undertaken by Board
2. Facilitate consensus and team building among the members of the Board
3. Ensure an effective orientation is provided to all new members of the Board

Issue # 3 Relationships between the Appeals Tribunal and the Board (62)

Should the Appeal Tribunal Chair be a Board member?
In the beginning, all WCBs in Canada were formed using the "Commissioner" model. This model consisted of a Board Chair and two or more Commissioners representing in equal numbers employers and workers with the responsibility for governance, administration and the final level of appeal for the system.
An apparent holdover from this model in the Yukon is the fact that the Board continues to act as the final appeal level for assessment and OH&S appeals.

Today the majority of the Canadian WCB systems have moved to a model that separates these duties. Governance is the responsibility of the Board, a President is responsible for the administration and accountable to the Board and there is an independent Appeal Body.

In order to ensure that the Appeal Body both in reality and in perception has an independence from both the administration and the Board, most Canadian WCBs have amended legislation so that the Chair of their Appellate Body no longer participates as a Board member.

Although the Chair of the Appeal Tribunal does not regularly attend board meetings in these jurisdictions, the legislation provides that the Chair of the Appeal body attend a Board meeting once each quarter. The objective is to ensure the Appeal Chair develops and maintains a close and effective working relationship with the Board members and that all parties accept that they are part of an integrated system that must work together.

Voting and Role of Appeals Tribunal Chair

Options

1. No change to legislation.
2. Amend the legislation so that the Appeals Tribunal Chair is clearly a voting member
3. Amend the legislation so that the Appeals Tribunal Chair is clearly **not** a voting member

Issue # 4 Links between the powers/duties of the board and the objects of the Act (60)

Board Governance - Roles and responsibilities
Part 11, sections 107 and 108 of the Act define the duties and powers of members of the Board as follows

107 - The duties of the Board are to

a. ensure that workers, dependents of deceased workers, and employers are treated with compassion, respect, and fairness;[13]
b. act in good faith when conducting the business of the board and in administering the compensation system under this Act; and
c. subject to subsection 93(1), maintain confidentiality in matters respecting claims for compensation when discussing or conducting the affairs of the compensation system.

Powers of the members of the Board

108 - The members of the board shall

(a) establish the policies of the board;
(b) create rules to
    (i) define circumstances that will constitute conflict of interest for its members,
    (ii) govern disclosure of conflicts of interest, and
    (iii) provide guidelines regarding participation and voting at meetings of the board by a member who has a conflict of interest.
(c) provide to the Minister an audited financial statement in accordance with subsection 63(6) no later than June 30th of each year, including reports on ….*(sub points deleted for brevity)*
(d) report to the Minister within 90 days after the end of each calendar year on all matters regarding the activities of the board;
(e) report in a timely manner on any matters that the Minister may request;
(f) consider and approve operating and capital budgets of the board;
(g) plan for the future of the board;
(h) examine, inquire into, hear and determine assessment matters, determinations under subsection 55(5) and appeals under Occupational Health and Safety Act;
(i) make publicly available all policies of the board relating to claims for compensation, assessment procedures, and occupational health and safety;
(j) before the adoption of any draft policy affecting claims for compensation, cause notice of the draft policy to be published at least once a week for two consecutive weeks, in a newspaper circulated in the Yukon, and the notice shall state ….*(sub points deleted for brevity).*

(k) promote awareness of the basic rights and obligations of workers and employers under this Act.

General Discussion of roles and responsibilities

The primary responsibility of each member of the Board must be to the workers compensation system and to all of its stakeholders – not just to the member's constituency. This responsibility represents a fiduciary duty on the part of each member to act in the best interests of the workers compensation system as a whole.[14] Some WCBs in Canada have this principle specifically enshrined in legislation and/or in their Board governance manual.[15]

Worker and Employer representatives as the primary stakeholders must ensure the Board has an understanding of the impact on, and reaction of, their respective communities of matters of significance to the system. However, the representative members must be also committed to acting in the best interests of the system as a whole and not simply in the best interest of their particular constituencies.

Members of the Board should be perceived to possess the ability to approach Issues with a thoughtful and open-minded attitude; good judgment; a willingness to devote sufficient time (including preparation time) to fulfill their responsibilities as a member; and, the ability to work on a collegial basis with the other members. These characteristics could be included in the Board governance manual.

The Chair is the person who must provide leadership to the Board, seek consensus and forge collegiality among the members and as such the Chair must be confident that prospective appointees are individuals with whom he/she will be able to effectively work.

The Chair must also be satisfied that prospective members have the knowledge and skills outlined in the Board's governance manual. For these reasons the Chair should be consulted by the Minister on member appointments.

Standard of care of the Board members

Some Canadian WCB legislation sets out "standards of care" for board members when exercising the powers and performing the functions and duties of a board member. Similar standard of care clauses are found in Sections 106 and 107of the Yukon's Act.

There are however, clauses found in other jurisdictions that could be added to enhance the Yukon Workers Compensation Act or alternately included in the Board's governance manual. Examples of possible additions are:

Subsection 163(1) of the Ontario Workplace Safety and Insurance Act which reads:

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[14] B.C. Royal Commission Report on Workers Compensation

[15] Ref: Workers Compensation Act B.C.: Alberta and B.C. governance manuals

"The board of directors shall act in a financially responsible and accountable manner in exercising its powers and its duties."

Another example is found in subsection 84(1) (b) and (c) of the Workers Compensation Act of British Columbia which require Board members to:

- act with a view to the best interests and objectives of the workers compensation system, and
- exercise the care, diligence and skill of a reasonably prudent person

Confidentiality of Board matters

Other than as outlined in subsection 107 (c) of the Yukon's Act, an area not covered by existing legislation is the Issue of confidentiality of matters being dealt with by the Board. There is no doubt that the Board will, on occasion, wish to maintain confidentiality with respect to an Issue it is considering. The rules or bylaws of the Board are the appropriate place to enunciate the nature and extent of the confidentiality to be given to any matter being dealt with by the Board and are covered in the Board's Governance Manual.

Options

Board Duties and Responsibilities

1. No change to legislation
2. Amend the legislation to include additional Board duties and responsibilities such as:
   - To act in a financially responsible and accountable manner in exercising their powers and performing their duties
   - To exercise the care, diligence and skill of a reasonably prudent person
   - To act with a view to the best interests and objectives of the workers compensation system

Issue # 5 Reporting structure of the President (61)

Background and Discussion

The Issue of a conflicting reporting relationship by the President to both the Board and to the Premier and Cabinet is an anomaly that has been pointed out by the WCHSB and the Auditor General. A dual reporting relationship is not the norm in other Canadian jurisdictions.

Only three jurisdictions (Ontario, Prince Edward Island and Newfoundland and Labrador) have government involved in the appointment of the President. In the case of Ontario the Lieutenant Governor in Council (LGC) makes the appointment. In the other two provinces the Board makes the appointment after conferring with the LGC.

The Board may have difficulty in holding the President clearly accountable for the operation and management of the system when a dual reporting relationship exists. A change to the Act making the Board responsible for appointing and evaluating the President would likely require consequential amendments to the Public Service Act (PSA) such that the Board has the authority to hire and fire the President. Further amendment might be required such that the employees of the board could continue to be included as public servants and yet remain accountable to the President.

Options

1. No change to legislation
2. Make amendments to the Workers Compensation Act and may require consequential amendments to other legislation such that the President would be responsible and accountable only to the Board Governance.
3. Make amendments to the Workers Compensation Act and may require consequential amendments to other legislation such that the President would be responsible and accountable only to the Commissioner in Executive Council.

Issue # 6 Processes for appointment to the Board and the Appeal Tribunal (64)

Background and Discussion
Subsections 22(5) and 106(5) provide that the Minister consult with workers and employers and their respective organizations prior to the appointment of the Chair and members of both the Board and the Appeal Tribunal. Submissions by stakeholders and the special examination by the Auditor General indicated that more needs to be done to ensure the selection and appointment process is transparent, efficient and considers the core competencies of candidates and their ability and willingness to commit the time required.

Appointment of Board members
Subsections 106 (3) and (9) of the Yukon Workers Compensation Act provide that the Commissioner in Executive Council shall appoint the Chair and Board members. Subsection 106 (5) directs the Minister to consult with employers and employer organizations about the appointment of members to represent employers; workers and organized labour about the appointment of members to represent workers and employers and workers about the appointment of the Chair.

Subsections 22(5) and 106(5) provide that the Minister consult with workers and employers and their respective organizations prior to the appointment of the Chair and members of both the Board and the Appeal Tribunal. Submissions by stakeholders and the special examination by the Auditor General indicated that more needs to be done to ensure the selection and appointment process is transparent, efficient and considers the core competencies of candidates and their ability and willingness to commit the time required.

There is currently no requirement for the Minister to consult with the Chair on member appointments.

Appointing Board members
As pointed out earlier in this paper, the primary responsibility of each member must be to the workers compensation system and all of its stakeholders – not just to the constituency from which the member was appointed. This responsibility represents a fiduciary duty to act in the best interests of the system as a whole.

It is incumbent on the worker and employer organizations consulted by the Minister when considering appointments to the Board to recommend candidates that are drawn from the most senior ranks of their organizations or callings.

Representative organizations should recognize the challenge the nominees will face and recommend persons that have courage and the leadership qualities that will inspire confidence. As Board members they will have to articulate to their representative groups the rationale behind the decisions of the Board even though, from time to time, the decisions may not be consistent with the views of their representative groups.

When candidates for appointment as Board members are being considered, the Minister should examine the candidate's particular knowledge, experience and background and be reasonably satisfied their skills will be needed and utilized by the Board as a whole.

Prospective members should be perceived to have the ability to approach Issues with a thoughtful and open-minded attitude; possess good judgment; be willing and able to devote sufficient time (including preparation time) to carry out their duties; and to work on collegial basis with the other Board members.

Similar to most large private and public entities many of the WCBs across the country have a governance handbook that includes a clear outline of the competencies that board members should possess. The Yukon Board has such a handbook.

Consideration could be given to a process that requires the Minister to consult with the Chair prior to appointing members to the Board to ensure core competencies are being met..

Appointing Appeal Tribunal members

The process to select the Chair and members of the Appeal Tribunal must also be one that is open and transparent. The appointment of the Chair should be done on the basis of merit – selected for his/her ability to fairly judge statutory and factual Issues. The skills the appointee must bring to the conduct and supervision of these quasi-judicial proceedings will be a credit to the overall system.[16]

The Appeal Tribunal Chair must be perceived by the stakeholders as being fair and impartial, independent from Government and the Board but accountable to Government. Assets that should be considered for the appointment of a Chair include whether candidates have legal training and experience within or knowledge of workers compensation systems. This may be a challenge given the current pay scale for the Chair's position.

The Minister should consult with the Chair of the Tribunal on nominees for appointment as members of the Appeal Tribunal to ensure core competencies are met. Since the Chair is responsible for administration and held accountable for its performance. the Appeal Tribunal should also develop key performance indicators and report annually on the success or failure in achieving the targets. In order to achieve these targets, the Chair must also establish performance goals for Tribunal members and individually evaluate their performance.

In spite of all the consultation process prior to making appointments, one must not lose sight of the fact that it is the Minister who is charged with making the final decision on the appropriate candidates for both the Board and the Appeal Tribunal.

Options

1. No change to legislation.
2. Amend the legislation to require the Minister to consult with the Chair of the Board before appointing new members to the Board and with the Chair of the Appeal Tribunal before appointing new Tribunal members. This would require minor legislative

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[16] B.C. Legislation and policy review, 2002

amendments. Consultation would ensure the Chair of the Board advised the Minister on his/her thoughts about which nominees would meet the competencies listed in the Board's governance manual. Similarly, the Appeal Tribunal Chair would be able to advise the Minister on her/his thoughts about the suitability, appropriate knowledge, skills and ability of nominees as members of that organization.

3. Amend the legislation such that the Minister shall appoint each representative of employers from a list of names submitted by employer associations; and each representative of workers from a list of names submitted by labour organizations. The Minister shall have sole discretion on the appointment of the Chair.

Issue # 7 Board policy developments (emerging Issues, are policies current?) (65)

Issue # 8 Consultation process on policy development (66)

Background and Discussion

These two Issues are grouped together because they are linked Issues.

Subsection 108 (j) of the Yukon's Act lists a detailed process for consultation on compensation policy changes. The specificity of this process is unusual in Canadian legislation and might be an impediment to timely policy development, amendment and decision making. Such detailed requirements could affect the flexibility the Board needs to deal quickly with an emerging/urgent Issue.

It is unusual that there is a prescribed process for policy amendments affecting workers compensation but no prescribed process for creating or amending policy that applies to employer obligations. Consideration should be given to amending the legislation so that the policy consultative process is the same for employers and workers.
Stakeholders have said they are frustrated with a perceived backlog of policy development as well as the slowness to develop policy covering new or emerging Issues.
However the experience in other jurisdictions is that when the resources are dedicated to respond to such criticism, stakeholder fatigue is one of the unintended consequences of dealing with large volumes of policy amendments over a lengthy period of time.

Concern over a backlog of policy Issues is not unique to the Yukon. The British Columbia WCB has had a staff of between 17 and 20 people working on policy amendment as a priority since the formation of their Policy and Regulation Development Bureau in 1998. It has taken them 7 years to remove the backlog and they continue to have a list of urgent and emerging Issues.

Emerging Issues require considerably more effort on the part of policy staff to develop consultation papers that have thoroughly analyzed the Issue. The staff must examine the existing policy, if any, on the subject in other jurisdictions or determine what actions others are contemplating. Depending on the Issue, there may be a requirement to do extensive research of medical literature in order to inform stakeholders and decision makers. All of the possible options need to be explored and the implications of each have to be evaluated in order to understand the impact on workers, employers and the administration.

Once completed the paper has to be distributed to the stakeholders for consultation. Dependent on the complexity of the Issue, stakeholders often require many weeks in order to prepare a thorough response. All of this process affects timeliness. Critics of slow progress of policy development often also complain that there is too little time to respond when they are consulted on proposed changes.

If subsection 108 (j) were repealed, specificity of the consultation process could easily be adopted as a Board policy and allow the flexibility needed for nimble development and consultation. The Yukon Board already has a process that provides for stakeholder input to policy development within its strategic planning process.

What could be done to catch up on backlogged and emerging Issues?
The Board could produce a list of policy Issues that are perceived to be out of date or redundant and consult with stakeholder as to whether they should be rescinded or not.
The Board could take a single decision on all of those where there was agreement to rescind.

For those policies that need amending or relate to emerging Issues, the Board could produce a separate list and ask the stakeholders to rank them according to their perceived priority and complexity/controversy. A rank from 1 to 4, where one is the highest priority would be assigned to each item; and a similar ranking system used for the policy's complexity/controversy level. This action would facilitate the development of a work plan that is capable of being achieved with the resources the Board is prepared to dedicate to the plan. Once the Board has finalized the plan it would be communicated to stakeholders.

Although unusual in the Canadian context, legislation could dictate a time frame for policy development as has been suggested by some stakeholders. Such a step would in effect require the Board to add as many resources as were needed to meet the legislative mandate. This could be extremely expensive given the potential volume of policy. The system in the Yukon has all the same complexity found in other jurisdictions.

Another more radical option would be to amend the Yukon legislation so that it was aligned as closely as possible with that in another adjacent jurisdiction. The Board could then simply adopt all of the associated policy created by the other jurisdiction using the assumption that the Yukon's employer and worker stakeholders would have the same views as those in the other jurisdiction.

Policy on adjudication conflicts
The PSC comments on the need for a specific administrative policy to address conflict of interest in adjudication of WCB employee claims by other WCB employees. The Board could consider an arrangement for staff from the NWT/Nunavut board, Alberta board or the B.C. board to adjudicate these.

Options

1. No change to legislation
2. Amend subsection 108 (j) such that the specificity of consultation is removed. The amended legislation should only require that Board policy outline the process and time frames for the policy development and consultation process. This option would allow the Board flexibility in setting the agenda and determining the resources required to carry out the plan. However, there will likely always be some backlog of Issues to be dealt with.
3. Amend the legislation to require the Board develop an annual policy development and amendment plan and also requires that the Board provide sufficient resources to carry out the plan.
4. Amend the legislation so it is aligned with that of another Canadian WCB – allowing the Board to adopt the associated policies without local consultation.
5. Amend subsection 108(j) such that the prescribed consultation applies to all policy, not just that relating to compensation.

Issue #9 Disclosure of financial/management information (70)

Background and Discussion
This Issue is broader than the topic and includes evaluation of effectiveness and efficiency of the board's operations as well as accountability for performance.

Strategic planning and key performance measures
Although the YWCHSB does produce a strategic plan, the Auditor General's report as a result of the Special Examination recommends the development of specific key performance measures with goals and targets and also that achievement against the plan be regularly reported.

Legislation could specify that the Board produce an annual service plan as is the case in some other Canadian legislation. This could be a separate document or included as a section in the Board's Annual Report.

An example is found in Section 82.1 of the Workers Compensation Act for British Columbia which requires the production of an annual service plan which includes that the Board set out priorities and identifies specific objectives and performance measures.

The inclusion of performance measures and the audited Financial Statements in the Board's Annual Report should alleviate some of the management performance and financial concerns.

Effectiveness, efficiency and benchmarking
Benchmarking workers compensation systems performance against each other is an extremely difficult exercise. Because of the significant differences between jurisdictions one has to apply complex mathematical formula to provide an accurate comparison. Examples of some of the differences are as follows:

- benefit entitlements are very different from one jurisdiction to another,
- the mix of industries covered by the system and the related severity of injuries is unique,[17]
- The relative size of the jurisdiction – is economy of scale possible.

The complexity of mathematical formulation required is well outlined in a study by John Burton a professor at Rutgers and long-time researcher on workers compensation and Terry Thomason a former professor at McGill University. In the study they compare the cost of 50 workers compensation jurisdictions. (48 states in the USA, the provinces of Ontario and British Columbia)[18]

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[17] For example: Ontario WSIB only covers about 65% of the provinces workforce, Farmers are not covered by the Manitoba WCB

[18] *Terry Thomason and John F. Burton, Jr. The Employers' Costs of Workers' Compensation in Ontario and Selected other Canadian and U.S. Jurisdictions, December 2000, tables 26, 27, 28 and 29*

In order for stakeholders to compare the efficiency and effectiveness of the Yukon system with some other jurisdiction a national benchmarking already exists. The Association of Workers Compensation Boards of Canada (AWCBC) has a committee of senior financial officers of the boards that annually produces 24 comparable (calculated in the same manner) key statistical measures. This project of the senior financial officers of the boards provides one of the best benchmarking systems in the world of workers compensation. [19]

Given the complexity of benchmarking to other jurisdictions, the most reliable comparisons are those made between the current year and prior years' performance of the jurisdiction itself. Even then one must be careful to factor in any changes to benefits or entitlements for the comparison to be accurate.

If a Board sets out a strategic plan with clearly defined goals and how achievements will be measured then the organization's effectiveness compared to its plan can be assessed when progress and achievement are reported.

The YWCHSB does produce a strategic plan and the Auditor General has recommended the development of specific key performance measures with goals and targets and that the achievements are reported regularly. The Board says they are in the process of providing performance measures in response to the Auditor General's Report.

Models of service plans exist in other WCB jurisdictions. In the case of British Columbia Section 82.1 of the Act requires the production of an annual service plan that includes a requirement to set out priorities and identify specific objectives and performance measures.

Assessment rates are commonly used as a surrogate for benchmarking efficiency and effectiveness across jurisdictions. However, this is a very poor way to compare. One should first understand how assessment rates are determined.

How are assessment rates determined?

Assessment rates reflect the apportioned costs of running a WCB system. Rates are driven by:

- benefits which are prescribed by legislation;
- injury frequency - usually measured by the # of lost time injuries per 100 person years of work and expressed as a percentage;
- severity – usually measured by average duration of lost time days/injury;
- administration and appellate costs;
- actuarial adjustments for various things such as changes to mortality rates
- Prevention and OH&S program costs
- Excess returns or losses on investments of the accident fund

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[19] www.awcbc.org

How do the components that make up assessment rates compare across Canadian jurisdictions?[20]

- **Benefit costs per $100 of payroll** in 2003 averaged $1.18 for all 12 Canadian WCBs. The highest cost was in NWT/Nunavut at $2.18 and the lowest in Ontario at $0.89. The Yukon was second highest at $1.70.
  Another way that benefit cost is compared is the current year average benefit cost per lost time claim. For 2003 the average of this measure for all 12 jurisdictions was $12,874. The highest ratio was in NWT/Nunavut at $22,537 and the lowest in Manitoba at $5,518. The Yukon ratio was 2nd highest at $21,950.
- **Injury frequency** for 2003. The highest was 4.81% in Manitoba and the lowest 1.47% in New Brunswick; however New Brunswick has a three day waiting period so the rate is not comparable. The Yukon rate was 2.86%
- **Severity** in 2003– The highest composite duration in Canada was Newfoundland where, on average, 104.6 days were lost per claim. The lowest composite duration was the Yukon with 42 days in 2003 however, it has risen to 100 days in 2004
- **Administration cost per $100 assessable payroll** in 2003. The Yukon had the highest cost at $1.00 and Alberta the lowest at $0.26. The nearest comparable location in terms of size is NWT/Nunavut whose administration cost was $0.87.
  Another way of comparing is to use the administration cost per lost time claim. In 2003 the highest cost was found in NWT/Nunavut at $14,056 and the lowest in Quebec and Manitoba at $2,315. The average for all jurisdictions was $3,795. The Yukon's was $12,889. These numbers underscore the benefits of economy of scale in larger jurisdictions.
- **Prevention and OH&S cost per $100 of assessable payroll**. The highest cost for 2003 was found in the Yukon at $0.18 and the lowest in Alberta at $0.03. The average of all 12 jurisdictions was $0.11. The numbers reflect the ability to take advantage of economy of scale. Higher investment in prevention tends to produces lower injury rates.
- For the year 2003, the Yukon's average assessment rate was $1.41. The rate is surprisingly low given that the sum of three of the key components in 2003 - benefit costs, administration costs and prevention/OH&S costs per $100 of payroll - amounted to $2.88.

The questions - What can be done to make individual assessment rates more transparent? and How can assessment rates are reduced? - are discussed in the Section titled ASSESSMENTS

Options

1. No change to legislation.
2. Amend the legislation to require the Board to develop strategic and service plans that set out priorities which have specific objectives and performance measures. The legislation should also require that the plan and achievements against the previous year's plan are published in the Annual Report.

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[20] www.awcbc.org/english/board

Issue # 10 Annual reporting of the Board and the President to the Legislative Assembly (67)

Background and Discussion
Section 109 of the Act requires that the Chair and the President appear annually before the Legislative Assembly.

Similar legislation does not exist in other Canadian WCB Acts.

The legislation of most other provinces in Canada requires that the Board provide the Minister with an annual report by a specified date and that the Minister place the Annual Report before the Legislative Assembly at the current or next (if prorogued) sitting of the legislature. The Annual Reports of these other jurisdictions also include all the audited financial statements as well as comprehensive statistical reporting.

In practice, in these other jurisdictions, the Minister has the Board Chair, President or other knowledgeable officials nearby to assist in answering questions when the report is tabled.

The Legislative Assembly in some jurisdictions also has the opportunity to question the Minister and the Chair, President or other officials who accompany the Minister during "Estimates" since the accountability of the Board is through the Ministry.[21]

What is unusual about the Yukon WCHSB Annual report is that it does not contain the audited financial statements for the year or the accompanying management discussion and analysis of the financials. When the financial and statistical data is not contained in the Annual Report it is difficult for the Legislative Assembly to evaluate the system's overall performance against its plan.

Options

1. Status Quo – no changes to the legislation.
2. Repeal Section 109. Follow the practice of the other legislatures and utilize the tabling of the Annual Report as an opportunity to question the Chair/President on the operations.

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[21] Reference British Columbia

Issue # 11 Releases of the annual report and the financial statements (68)

Background and Discussion

Subsection 108 (c) of the Act requires that the Minister is provided with the Board's audited financial statement no later than June 30th each year and subsection 108 (d) requires the Board's Annual Report be provided to the Minister within 90 days following the end of each calendar year.

Two different time requirements create the opportunity for a serious disconnect in information available to evaluate the organization's performance.

All other Canadian WCBs produce one report which includes the Chair's report of the Board's operation; the President's report on the administration's operations; the strategic objectives for the next year; important statistics, performance measures and outcomes; and most importantly the audited financial statements including a management discussion and analysis of the financial statements.

The Yukon practice of reporting the operational and financial information separately, with as much as a three month interval between reports makes it very difficult for the Legislative Assembly and stakeholders to comprehensively evaluate the system performance.

The Board could choose to produce only one report and comply with Sections 108 (c) and (d) – it just means that they have to complete the Annual Report and get the Auditor General's staff to complete their work within 90 days of the calendar year end. The problem in achieving the 90 day time frame is likely a result of the Board's inability to get the year end financial statements audited in time to include in the Annual Report.

The legislation could be amended such that the Board's Annual Report including the audited financial report was submitted to the Minister within a time frame that allowed the Auditor General's staff to complete the audit. With the exception of Ontario, all other Canadian WCBs seem to be able to obtain their Provincial Auditor General's audit report within 90 days following their year end. A solution for the Yukon might be to have the financial audit completed by a private sector audit firm acceptable to the Auditor General as is the case in Ontario where KPMG was the auditor in 2002.

Where time constraints in other Canadian WCB jurisdictions are tight the administration advises that they are stressed in meeting the deadline and believe that, on occasion, report quality suffers as a result.

Options

1. No change to legislation
2. Repeal Sections 108 (c) and (d) of the Act and replace them with one Section that requires an Annual Report including audited Financial Statements be provided to the Minister within a time frame that the Board staff can meet. That time frame might be 90 days following year end or some longer period that allows the board sufficient time to have the financial statements audited and included.

Issue # 12 Consistency of scheduling the annual information meeting (69)

Background and Discussion

This Issue is a result of the different time requirements for the submission of the Board's Annual Report and the audited Financial Report to the Minister.

If the Board is unable to have the audited financial report filed with the Minister before June 30th, then it is reasonable that the board not schedule the Annual Information meeting with stakeholders during the prime summer vacation months of July and August.

Holding the Annual information meeting in September means that the board's operations are 8 to 9 months into the next operating and fiscal year before the stakeholders have an opportunity to see, evaluate and discuss the previous year's performance. The information stakeholders are discussing is very stale by the time of the meeting and this is likely a more serious Issue than having a fixed date for the Annual Information meeting.

If the Board was able to produce the Annual Report including audited financial statements by the end of March as recommended in 3 of Issue #10 then the Annual Information meeting could be scheduled following the Minister's release of the report. The meeting with stakeholders could as a result be scheduled during the month of May.

Not all legislation in Canada requires that the WCB hold an Annual Meeting to discuss the Annual Report. In practice however, whether enshrined in legislation or not – all Canadian boards do have one or more stakeholder meetings during the year to present information on the previous years operations, discuss current year priorities and obtain feedback from the stakeholders.

The suggestion that there be a fixed date for the Annual information meeting in the legislation appears to be driven by a desire for stakeholders to be able to schedule their time well in advance of the meeting to assure their availability. This problem could be eased somewhat by the board announcing the date and location of the meeting(s) at least 30 days in advance.

Options

1. No change to legislation.
2. Repeal subsection 111 (1) and replace it with a subsection that requires the Annual Information meeting be held during a specific week of the year.
3. Repeal Section 111 (1) and replace it with a requirement that the Board hold the Annual Information Meeting(s) within 45 days of the public release of the Annual Report. This requirement combined with 3 of Issue #10 would result in the meeting being held during April or May, depending on the date the Minister releases the report. This should be early enough that the information is relatively current and before stakeholders are in the midst of the busy summer season.

Issue #13 Promotions of WCB and occupational health and safety programs and accident prevention strategies (71)

Issue #14 The effectiveness and appropriateness of the Board administering both the Workers Compensation Act and Occupational Health and Safety (OH&S) (73)

Background and Discussion

These two Issues are grouped for discussion purposes since the topics are closely linked. Issue # 13 is of concern to the PSC and the Auditor General but it is not an Issue for employer stakeholders.

The Auditor General's Report recommends a need to develop a formal prevention strategy and plan that includes performance targets and measures, incentives for employers to improve injury reduction and the need to determine the level of prevention effort that is affordable.

Prevention of occupational injury and disease is primarily an employer responsibility in legislation. The law and regulation sets out specific rules to reduce or eliminate workplace risks and hazards. All Canadian provinces have an OH&S monitoring capability to ensure compliance with the rules set out in their legislation. All WCBs also have strategies that provide incentives for employers to achieve injury reduction and also strategies to promote workplace injury reduction.

The Ontario WSIB has introduced a program that provides a 5% discount in premiums to employers who take a four week course offered by the Safe Communities Coalition in co-operation with WSIB.[22]

Prevention Strategies

In the last 8-10 years many WCBs in Canada have begun to set annual injury reduction targets to reduce the social and economic costs of workplace injury. Most boards took the first step in setting a reduction target with great trepidation since they were not sure they could achieve the predicted outcomes. In those jurisdictions where the injury rate was initially high (5 to 6 lost time injuries (LTI)/100 person years) the risk of setting a reduction target was not as great. Reductions in the range of 2% to 10% per year have been achieved in some of these jurisdictions over the last 5 to 8 years.

The use of an injury reduction measure was a move away from counting activity (number of inspections, orders and penalties) as a measure of performance. The reduction of lost time injuries is now the key prevention performance measure in many jurisdictions.

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[22] http://www.northernlife.ca/policeBeatArticle.asp?28id2-pn=&view=86709

The experience in other jurisdictions is that results related to new strategies lag their introduction by a year or two and that the investment in prevention needs to be sustained over a long period to achieve and maintain results.

What is the social and economic benefit of injury reduction?
The B. C. board's actuary stated that a 1% reduction in their injury rate would avoid $10 million in injury costs. This was based on B.C.'s total annual cost of injuries amounting to one billion dollars. Another way of portraying the benefit is the reduction in human suffering as a result of a 1% reduction in loss time injuries. For B.C. this meant 700 fewer workers would suffer a lost time injury. A clear business case can be made for investment in prevention and in B.C. it has resulted in the injury rate being halved over the last 5 years.

In the Yukon context a 1% reduction in injury rate would represent a cost avoidance of about $150,000 per year and 4 fewer lost time injuries.

The Issue of where the administration of OH&S legislation resides is not unique to the Yukon.
The Province of B.C. has had prevention as a mandate since the inception of the system in 1917. The Report of the B.C. Royal Commission on workers compensation in 1998 and the subsequent Legislation and Policy Review by Alan Winter in 2002 both confirmed the stakeholders' desire to maintain the responsibility with WCB. [23]

Similarly, the CSST (Quebec's WCB) in the Province of Quebec has had responsibility for OH&S for more than 40 years.

Some jurisdictions have moved the responsibility back and forth between Government departments and the WCB over the years. At present the majority of WCBs in Canada have jurisdiction for the inspection of workplaces and the enforcement of occupational health and safety legislation.

Who pays for the cost of OH&S inspection and enforcement in Canada?
Regardless of the administrative location for OH&S, all Canadian WCBs pay for the cost of inspection and enforcement operations. The costs are either included as an administrative expense because the jurisdiction's WCB has the legislated responsibility or because the WCB is required to reimburse Government for the cost of maintaining the department with OH&S responsibility. This was not always the case. However, over the years every legislature has concluded that the cost for the inspection and enforcement of occupational health and safety at workplaces should not be borne by the general taxpayer.

The WCBs in Canada who do not have direct responsibility for OH&S are Alberta, Saskatchewan, Manitoba and Ontario. However, each of these Provinces in addition to the funds provided to Government for OH&S Departments also has an additional budget for the promotion of injury reduction.

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[23] www.labour.gov.bc.ca/labr_pub.htm

Is there an advantage to having OH&S administered by WCB?
It is not clear that separating the prevention and the inspection/enforcement functions provides any advantage. There are synergies that exist and improved injury reduction is possible when the compensation and complete prevention functions reside in one administration. Furthermore, there has to be a benefit from not duplicating the overhead cost of operating separate entities for prevention and inspection/enforcement.

Some larger jurisdictions such as B.C. have information system capability to provide employers with a "report card" that lists their injury rates; injury costs/$100 payroll compared to their sector average; their assessment merit/demerit rating; and the number of inspections and penalties they have had. The data is available to the employer online and covers each year over a three year period.

The Yukon Board could evaluate whether such data is available from their existing information systems. If not, the Board could determine whether an adjacent jurisdiction, such as British Columbia, were amenable to sharing their software program and whether it could be integrated with the Yukon's systems.

Options

1. No change to legislation
2. Amend the legislation to remove the OH&S inspection and enforcement component of prevention from the YWCHSB and create a department within Government to carry out this program. Removing the OH&S function from the board could result in a significant loss of focus on injury reduction. This move could result in added costs which would not be in the control of the Board.

Issue #15 Administration costs (75)

Background and Discussion

What do we characterize as administration cost?

In a private enterprise the costs are broken down among different functions such as production, sales and administration. The term administration cost is considered as overhead and includes functions such as human resources, payroll, legal, and general management.

Some boards in Canada assign all costs related to claims management such as adjudication, vocational rehabilitation, etc. as a claim cost and consider these more akin to production costs in a private enterprise. The rationale is to provide some clarity of the "overhead" component of administration cost.

How can process costs be reduced?

A primary means of reducing overall process costs for a workers compensation system is to reduce the number of new claims being processed. Even if the number of claims is dramatically reduced there remains the long term costs associated with the number of claims filed with the system in previous years.

The inventory of claims processed in the past grows each year and as such there is potential for the number of re-opening or reprocessing of old claims to increase. The duration of liability for claims in a WCB system is between 20 and 40 years. In other words, if no new claims were filed in the future, there would still have to be employees involved in managing the inventory and re-adjudicating some of those claims for as long as 40 years into the future.

A particular concern to the Yukon board is the several different eras of legislation and associated policy. The complexity drives increased adjudication cost and the number of appeals. Changes in legislation to simplify adjudication might result in retroactive changes to worker entitlements which either enhanced or reduced them. Any reductions would be unfair to workers and any enhancements would be unfair to employers who have to pay increased costs.

Has adjudication become more difficult over time?

All workers compensation systems have found that the mix of injury types has been changing over the years making the adjudication process more difficult and thus more costly. Historically workers compensation dealt mainly with traumatic injuries. Claims consisted of injuries where there was a broken or amputated body part or the loss of a life and the adjudication was relatively straight forward because the injury was visible and there was no dispute that it occurred on the job. As the systems began to experience claims being filed for strains, sprains, diseases and stress, the adjudicators found that much more effort is required to investigate and decide whether the injury or disease is predominantly a result of work.

Is the Yukon's administrative cost abnormal?

Comparability to other jurisdictions is difficult. The Yukon is the smallest of all the 12 WCBs in Canada yet it has all of the complexity of legislation, the cost of occupational health and safety as well as a remote location where the cost of operations are higher. Furthermore, because of its size economies of scale do not exist.

YWCHSB commissioned the report "Review of Administration Cost", November 1998, [24] which discusses and compares its administration costs. The report concluded, "Total administration costs for the Yukon Board appears to be reasonably consistent with those incurred by other Boards when costs are compared on a basis that properly recognizes variations in the sizes of the various Boards." The report also estimated the base cost of a workers compensation system without claims adjudication, vocational rehabilitation services or prevention. There are some fixed costs which the organization must incur regardless of size. The report concluded, "Due to the impact of economies of scale, the Board's administration costs represent a higher proportion of the Board's overall operations than for larger Boards. Although service levels and other legislated obligations are similar in the Yukon to most other jurisdictions, the infrastructure costs associated with the delivery of those services has to be spread over a much smaller base."

Using the Association of Workers Compensation Boards of Canada (AWCBC)[25] data for 2003 one can calculate the administrative cost as a percentage of total cost.
The Yukon's administrative cost as a percentage of total cost was about 33% in 2003. The closest comparable WCB is NWT/Nunavut with about two times the claims volume and an administration cost of 29% of total cost in 2003. Other considerably larger WCBs in Canada have ratios of 20 to 23%. The other measure used for comparison purposes is the cost of administration per $100 of assessable payroll.

What have other systems done or considered to reduce administration costs?

Some WCB legislation in Canada[26] provides for a waiting periods of up to 3 days before compensation is paid. This is similar to a deductible in other insurance systems. The introduction of the waiting period resulted in a reduction of claims filed with the system by 20%. Critics of the deductible argue that workers with relatively minor injuries do not report these in order to avoid the associated loss of pay and as a result run a significant risk of infection, if a traumatic injury, or an aggravation of the condition that leads to a more severe injury.

Quebec legislation requires the employer to pay the first 2 weeks of compensation albeit the CSST[27] adjudicates and reimburses the employer. Manitoba enacted this same provision in April of 2005. This approach is designed to ensure pay continuity to workers and has an added benefit of reduced duration of injury since the employers tend to be more aggressive with disability management.

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[24] http://wcb.yk.ca/fileadmin/user_upload/PDF_files/reports_and_publications/admincosts.pdf

[25] www.awcbc.org

[26] Nova Scotia, New Brunswick

[27] Quebec's WCB

In Australia[28] some schemes require the employer to pay the first 2 weeks of disability without reimbursement from the system. The employer is self insuring for the first two weeks of disability. In Victoria State this change resulted in about a 60% reduction in claims filed. There are several concerns with this approach. The first is that employers will coerce workers to continue to work while injured or not pay them while they are off work. This requires the board to investigate complaints from workers and take enforcement action. Second, the injury costs may be shifted to the employer's sickness and accident insurance plan. The result is under-reporting of injury claims to the WCB system. These alternate insurance plans also often provide lower benefits for workers.

If new claims are reduced will the administration cost be reduced accordingly?
As a result of being in business for 90 years WCB systems in Canada have developed large inventories of old claims. Depending on the legislation, some jurisdictions have found that the administration cost associated with re-opening of previously filed claims and subsequent appeals accounts for more than half of the total administrative cost.
To contain cost, some jurisdictions have introduced new legislation designed to reduce the number of appeals and re-opening of old claims by placing time limits on appeals and allowing re-opening only if there is substantial new medical evidence. This Issue is examined further in Legal and Policy Issue #42, "Administering prior years' legislataion, policy or orders.

Could smaller WCB jurisdictions join together or collaborate to reduce overhead?
Canada has many WCB jurisdictions that have low volumes of claims when compared to the larger provinces. For example; the total volume of claims processed by the four Atlantic Maritime Provinces is about ½ of that processed in either of Quebec, B.C. or Alberta. However, the cost of overhead is replicated in each maritime jurisdiction.
Proactively these 4 Maritime Provinces have been discussing collaborative options to pool activities and reduce overhead cost. The types of combined programs could range from pooling their accident fund investments to common computer system architecture and platforms and central adjudication.

Can the apportionment of administration cost by industry sector be fair and transparent?
Is it possible to breakdown administration costs so that employers in each industry sector can see their share of claims cost, administrative cost, prevention cost, etc. which when combined define their assessment rate?

Some jurisdictions have the information systems capability to break out these costs by industry sector. They also have Board policy determining how they will apportion costs by industry sector. The Annual Report provides a breakdown of each category of overhead by industry sector This is called the statement of changes in rate group balances.[29]

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[28] Victoria State

[29] http://www.worksafebc.com/publications/reports/annual_reports/default.asp

In B.C. for example policy states that: the cost of claims administration and the general management and support cost is apportioned according to the percentage of claims received from the industry sector; prevention costs is apportioned according to the number of inspections completed by sector; assessment costs are apportioned by percentage of assessable payroll from an industry sector.

The Yukon board's actuary advises that since 1998 the Yukon WCHSB has had the systems capability to apportion claim and other costs down to the individual employer level

Options

1. No change to legislation.
2. Amend the legislation such that employers are responsible for paying worker during the 1st one, two, or three weeks of disability. The board would continue to adjudicate and reimburse employers. Employer stakeholders may not easily accept that the cost of income continuity would be offset by administrative savings if they paid the worker during the1st three weeks of disability even though they would be reimbursed. The cost of this approach may be prohibitive for small employers.
3. Amend the legislation to link the administrative costs of the Board to a percentage of Assessments or Benefits paid.
4. Evaluate the opportunity of amending the legislation to harmonize with an adjacent jurisdiction (NWT/Nunavut, Alberta or B.C.) with a view to contracting the adjacent Board to provide all of the services. This could save $0.60 to $0.70 per $100 assessable payroll and also ensure highly qualified personnel are available. This may mean giving up local control of legislation and policy which have unique provisions applicable to the Yukon. Local employment would be affected.

Issue # 16 Attraction and retention of key personnel (76)

Background and Discussion

The Auditor General's Report discussed several options and their implications. Readers are referred to the Discussion Paper and/or the Auditor General's Report for the detail.
The Auditor General stated that a change to the public service status of board employees was not a viable option.

The B.C. Board had a similar problem with the recruitment and retention of key, highly skilled Information Systems employees during the development of large new systems at a time when these people were in high demand by external consulting firms. The Board of Directors was concerned that this was a temporary situation and was unwilling to agree to boosting salaries permanently to make them competitive. The solution was a discussion with the union and agreement to amend the collective agreement so that the Board had the flexibility to designate certain key positions that could be paid a recruitment or retention bonus of up to 30% higher than the collective agreement salary for the key position's classification. The need for the bonus or its amount is decided annually by the Board.

Options

1. No change to legislation
2. The Auditor General suggested the YWCHSB explore options with the Yukon Government for more flexibility in classification and salary levels that require specialty expertise and are difficulty to retain and recruit.

ASSESSMENT ISSUES

Issue #1 Access to information on which individual assessment rate is based and calculated and rationale for any change to assessment rates (46)

Issue # 2 Distribution of administration costs to industry classifications (47)

Background and Discussion

These two Issues are closely linked and are grouped together for discussion.

Sections 67, 68 and 69 of the Act outline the board's authority to provide different assessment rates, to classify employers by industry sector, to experience rate employer premiums and to provide relief of cost. Section 105 sets out how the Government of the Yukon shall pay for assessments and administration costs related to claims of its workers.

The pertinent sections are listed below:

Assessment Rates

67(1) The Board may provide for different assessment rates applicable to each class and sub-class of industry created under section 68.

(2) Publication in the *Yukon Gazette* of a statement of percentages and rates set by the Board applicable to specific industries constitutes an assessment on, and notice to, each employer in the *Yukon Gazette*.

Employer classification

68(1) For the purpose of section 64, the board may establish classes and sub-classes of industries as it considers appropriate.

(2) The Board shall assign every employer to an appropriate class or sub-class on the industry in which the employer operates.

Employer experience accounts

69(1) The board shall maintain experience accounts for each employer, indicating the assessments levied and the cost of all claims chargeable in respect of the employer.

(2) If, in the opinion of he board, a worker's disability results, in whole or in part, from the negligence of an employer who is not the employer of the disabled worker, or a worker of that employer,

(a) the cost of any claim, as determined by the board, may be charged to the experience account of that employer; and

(b) if the employer is in a separate class or sub-class from the disabled worker's employer, the board may charge the cost of the claim, as determined by the board, to the class or sub-class in which that employer is included.

in proportion to the degree of negligence the board attributes to that employer or that employer's worker.

(3) If a worker suffers a work-related disability, the disabled worker's employer may, within 24 months of the disability arising, request that subsection (2) be applied by the board.

Government of the Yukon

105(1) the Government of the Yukon shall pay to the Board

(a) the cost of compensation for all work related disabilities of its workers that were caused before 1993;

(b) annual assessments after 1992 for all workers other than workers designated as workers under subsection 5(1) or 5(2) of this Act;

(c) the cost of compensation for all work-related disabilities of those persons designated as workers under subsection 5(1) or 5(2) of this Act, together with an administration fee of 15 per cent.

Workers compensation systems are based on mutual (communal) collective liability. Employers are grouped into subclasses that have similar risks and hazards for assessment rate setting purposes. The system is designed to collect the current year cost and the expected cost for all future years associated with the claims that occur within the calendar year – this is known as the insurance book for the year. The concept is to strive to ensure that the employers who are in business in a particular year will pay the current and future cost of all claims occurring in that year.

How are rates determined?

The Board has a difficult task establishing the assessment (insurance) rates for the next year. The board does not know how many claims will occur within the next year or the cost of those claims. As a means of estimating the cost for the future year – the board looks back at the experience of a class or subclass over several years in the past and utilizes the average cost, modified by any trends up or down, as a surrogate to estimate the next years claim cost.

- Added or subtracted from this estimate is the difference between the actual cost of the previous year's claims and the original estimates used to develop the rate for the previous year.
- As well, there may be an addition of cost related to claims from the past that have had adjustments related to increased disability over the last year or where the disability was under assessed originally.
- The cost of the administration budget including the cost of OH&S is then added to determine the class or subclass assessment rate (insurance premium) for the next year.
- Excess investment income or a deficiency in investment income – related to the required returns to meet the discount rate used and the estimated cost of inflation – is then added or subtracted to determine the final assessment rate.

The objective is to charge employers assessment rates that are not more than is required to produce sufficient funds to meet the estimated costs for the next year, including any special provisions for reserves. At the end of the year the board can determine if the amount charged was sufficient, too high or not enough and adjust the next year's rates accordingly.

In a near perfect system the board will have neither a surplus or deficit compared to future years needs at the end of each year. The objective is to have the amount of surplus or deficit modulate (move up and down) around 100% of the future needs of the accident fund.

Most Canadian boards as a result of excess investment earnings of the Benefit Liability Fund currently have a surplus of funds compared to future years needs. However, there are some Canadian boards that are in significant deficit and large assessment rate surcharges are required and planned to exist for decades in an attempt to bring the fund into balance.

Employers in some jurisdictions have stated that the level of the assessment rate (insurance premium) compared to other jurisdictions is not as great a concern for them as is a rate that changes by significant amounts from year to year. The employer's ability to financially plan is affected by a rate that has dramatic swings.

The Yukon board is very fortunate since it has had a large surplus in the Benefit Liability fund when compared to the actuary's estimate of future requirements for claims that occurred in the past. In order to reduce that surplus to a more modest amount employers have been enjoying rates over the last few years that are significantly below the actual cost of running the system.

Some boards in Canada take a different approach. Even though their fund has a surplus to future needs they charge employers assessment rates that reflect the actual estimated annual cost of running the system so that employers are fully aware of the component costs. At the end of each year funds surplus to the actual needs are rebated in a cash payment to employers. [30]

Can information on rate components be provided?

In 1998 the Yukon board introduced an information system capable of breaking down administration costs so that employers in each industry sector can see their share of claims cost, administrative cost, prevention cost, etc. which when combined, for the most part, define their assessment rate.

Board policy determines how costs are apportioned by industry sector. Claims adjudication costs are apportioned by employer and class/subclass according to their percentage share of the total cost of claims. General administration is apportioned on the basis of the employer's /class payroll as a percentage total payroll. Other costs are apportioned according to the employer's /class percentage of assessment revenue.

The British Columbia Annual Report provides a breakdown of each category of overhead by industry sector. The analysis is called **the statement of changes in rate group balances**.[31]

In B.C. for example, policy states that:

- the cost of claims administration and the general management and support cost is apportioned according to the percentage of the cost of claims received from the industry sector;
- the prevention costs are apportioned according to the number of inspections completed by sector;
- the assessment costs are apportioned by percentage of assessable payroll from an industry sector.

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[30] For example: Saskatchewan

[31] http://www.worksafebc.com/publications/reports/annual_reports/default.asp

Example of Statement of Changes in Rate Group Balances from British Columbia

Statement of Changes in Rate Group Balance
$000s

For the Year Ending December 31st:	2000	2001	2002
Opening Balance	$0	$1,195	($8,068)
Current Year Premium Income	$11,111	$9,170	$13,724
Current Year Claim Costs	($8,837)	($12,532)	($12,228)
Current Year Operating Costs	($2,767)	($1,610)	($1,253)
Current Year Surplus (Deficit)	($493)	($4,972)	$243
Prior Years' Claim Costs	($9,324)	($10,244)	($11,002)
Investment Income	$9,719	$7,363	$3,989
Rate Group Restructuring Costs	($1,461)	($1,410)	($2,004)
Balance Before Non-Recurring Items	($1,559)	($8,068)	($16,842)
Non-Recurring Items:			
Legislative Changes	n/a	n/a	$5,408
Implementation Costs for Legislative Changes	n/a	n/a	($324)
Provision for Equity Market Impairment	n/a	n/a	($6,735)
Transfer from Reserve	$2,754	n/a	$382
Subtotal of Non-Recurring Items	$2,754	$0	($1,269)
Ending Balance	$1,195	($8,068)	($18,111)
Ending Balance as a % of Premium Income	11%	-88%	-132%

The Board has the ability to create policy to set out the criteria for availability or release of information to employers on the components that make up their individual assessment rates. The board could provide a statement of changes in rate group balances in the annual report similar to that provided in B.C. The board could seek access to the software program B.C. uses to provide the online employers report card and determine feasibility of providing this information

Access to individual employer rate information
For reasons of protection of privacy of information and to protect individual business interest no jurisdiction in Canada provides employer assessment rate information to a 3rd party.
An individual employer may have access to the component costs that make up their individual assessment rate. These components include claims costs, share of administration cost, OH&S inspection and enforcement costs, OH&S administrative penalties and the employer's merit /demerit experience rating that drive surcharges or reductions to the base subclass premium.

In British Columbia, employers have online access to their individual *employer report card*. This allows them to view:

- their total claims costs and cost per $100 payroll for each of the past 3 years, compared to the subclass average;

- Their average rate compared to the base rate for the subclass and the percentage of their experience rating (merit/demerit).
- Their OH&S history – number of inspections, orders and penalties.

Options

1. No change to legislation.
2. The legislation could be amended to require the Board to provide a statement of rate group balances in the annual report.

Issue # 3 Equal treatments for all employers (59)

Background and Discussion

Prior to 1990 the Yukon board's financial statements lacked clarity. The system had several separate injury funds as opposed to one consolidated accident fund. The claim information system introduced in 1992 provided the board with the first systematized capability to track claims costs and determine more precise estimates of future liabilities.
This also meant looking back and establishing accurate estimates of future liability for claims that were in the system prior to 1992.

The accident fund showed a significant surplus as a result of the fortunate and prudent investment in high interest bearing bonds, the use of a discount rate for future liability and the introduction of the claim cost tracking system.

How is the Yukon Government assessed?
Section 105 of the Act states
105(1) The Government of the Yukon shall pay to the Board
(a) the cost of compensation for all work-related disabilities of its workers that were caused before 1993;
(b) annual assessments after 1992 for all workers other than workers designated as workers under subsection 5(1) or 5(2) of this Act;
(c) the cost of compensation for all work-related disabilities of those persons designated as workers under subsection 5(1) or 5(2) of this Act, together with an administration fee of 15 per cent.
(2) Annual assessments payable by the government of the Yukon shall be a charge on the Yukon Consolidated Revenue Fund.
(3) Section 81 and all of Part 8 of this Act shall not apply to the Government of the Yukon.

Since 1993 the Yukon Government has been assessed premiums for workers compensation coverage for its employees the same as every other Yukon employer with the exception of compensation costs related to volunteers and other person designated as workers under subsections 5(1) or 5(2) of the Act. For claims filed under subsections 5(1) and 5(2) of the Act the government pays the cost of the claim and a 15% administration fee.

The Yukon Government contributes 21% of the volume of all claims processed by the board, represents 39% of the assessable payroll and the portion of the board's overall expenses its premiums cover is about 16%.

The Government has argued in the past that it did not share equitably in the distribution of the surplus in the fund that was built up prior to the Government becoming an assessable employer. There are two views associated with this concern. First, the Government was not an assessable employer during the period when the surplus developed and the argument is that because it did not contribute to the surplus then it should not share at the same rate as other employers. Second, the Government argues that there are very few employers who are still operating that contributed to the surplus and therefore it is entitled to the same treatment as all other employers.

The introduction of the 1992 claims cost tracking system at the employer level gave the board data it never had and after several years of tracking it became apparent that the assessment structure needed revision to make it more equitable.

In 1998 the board undertook an assessment review that resulted in a restructuring of the makeup of classes/subclasses and rate groups. Some employers with high injury rates and claim costs had been subsidized by other employers within their class. The reassignment of employers to new rate groups in order to make the rate group and subclass structure more reflective of the cost rates experienced by those employers resulted in a need to transition employers who had enjoyed low assessment rates relative to their cost rates to higher cost rate groups. This is not an unusual event in workers compensation systems especially if there has been no change for several years.

The transition often results in some inequity over the transition period.

For example: British Columbia had not revised their assessment rate structure for 30 years and in 1998 after a few years of planning introduced a new system. The transition took as long as 5 years for some employers to reach their new rate group base premium rate. Some employers were moving from rate groups that had about $4.00 rates to ones where the cost rate was in excess of $15.00. On the other hand some employers were transitioned to their new groups over a 2 year period. One could argue that different employers were treated differently even though the transition rules were the same.

The following subsections of the Act set out the Board's discretion regarding assessment rates.
64(1) The board shall assess employers for any sums that the board may require for the administration of this Act.
67(1) The board may provide for different assessment rates applicable to each class and sub-class of industry created under section 68.

The key Issues appear to relate to the transition from restructuring the subclass system to more equitably group employers with similar cost rates to the same subclass and assessment rate and the distribution of the surplus through a subsidy of rates or in the case of the government a subsidy of their share of the overhead costs of running the system.

The transition to the new structure is completed; the surplus has been reduced to a point where the subsidy if it exists will be smaller. Looking forward it appears that the Issues have disappeared.

Options

1. No change to legislation.
2. Amend the legislation to allow the board the ability to audit Government in the same way it audits other employers in the Yukon

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BENEFITS ISSUES

Issue # 1 Age limitation of claimants (2)

Background and Discussion

Sections 3 (1) and 3 (2) of the Act limit the payment of compensation for **loss of earnings** to age 65 or in the case of a worker over the age of 63, **loss of earnings** may be paid for up to 24 additional months.

All boards in Canada (except for NWT/Nunavut) have similar provisions.

History

When workers compensation systems were first introduced they provided lifetime loss of earnings replacement for permanently disabled workers. The life expectancy of the population was not as high as 65 years and as such the workers compensation legislation did not contemplate providing workers with benefits much beyond the age of 65. The reality before the discovery of antibiotics and the vast improvement in medical equipment and facilities was that workers who had severe disabling injuries did not live long. Prior to the 1960's there were no other social benefit programs and not many firms had pension plans to provide retirement income. Workers continued to work as long as they were able.

When Bismarck introduced the first universal pension plan (social security) in Germany, it provided that citizens would begin receiving pensions at age 65 however, the average life expectancy at the time was 47 years. It was a great plan – but not many could benefit. Today all similar social benefit plans are in trouble financially because the life expectancy increases have meant almost everyone receives benefits.

The outlook for workers and the general population changed over the last few decades. Government pension schemes were established. (Canada Pension Plan, Old Age security, Guaranteed Income Supplement). More employers began to provide pension plans. The introduction by Government of the Registered Retirement Savings Plan program gave workers the ability to set aside a reasonable portion of their current earnings for retirement. These retirement benefit programs became increasingly important as the life expectancy of the population increased. (Currently in the range of 78 to 82 years) The life expectancy statistics, used by the Board's actuary are the Canadian averages. According to Statistics Canada, life expectancy for both sexes combined reached 79.7 years in 2001.

Legislators in Canada, when considering all of these changes, came to believe that the replacement of **loss of earnings** by workers compensation systems beyond the normal retirement age of 65 resulted in a substantial overpayment of benefits. As a result, the **loss of earnings** component of compensation now ceases for workers in every Canadian WCB jurisdiction after the 65th birthday. All Canadian systems, recognizing that some retirement benefit was needed, introduced legislation that provides workers with disabling injuries an amount, depending on the jurisdiction, varying from 5% to 10% of the loss of earnings paid prior to age 65.
The Yukon legislation requires that 10% of the loss of earnings replacement be set aside to purchase an annuity and it is among the best in Canada.

Subsection 3 (2) of the Yukon's Act, similar to all other Canadian legislation, provides a presumption that the worker would have retired upon reaching the 65th birthday – the standard retirement age.

Some jurisdictions in Canada have however, decided that the presumption that a worker would not have worked beyond age 65 should be rebuttable in order to avoid injustices to workers who would have retired at a later date. This concept was introduced to take into account that with longer life expectancy, some workers may have planned to continue working beyond age 65.

Jurisdictions that use the rebuttable presumption also have board policy that states a standard the evidence must meet when considering whether a worker planned to work beyond age 65. The standard provides that the evidence must meet a "clear and objective" test in order for the rebuttable presumption to be applied.
This rebuttable presumption feature does not exist in the Yukon legislation.

Options

1. No change to legislation
2. Amend the legislation to provide for payment of loss of earnings to the date the worker, had they not suffered a disabling injury, would have retired. The amendment should require the worker to provide "clear and objective" evidence of a planned retirement date that is beyond their 65th birthday

Issue #2 How government consents to/accepts responsibility for volunteers (3)

Background and Discussion
Subsection 5 (1) of the Act provides a lengthy list of those persons designated as workers employed by the Government of the Yukon. The detail provided in this subsection is far superior to that found in the legislation of other WCBs in Canada.

Subsection 5 (2) of the Act provides that the Commissioner in Executive Council may prescribe that any other persons or classes of persons be designated as workers employed by the Yukon Government. This provision is common to that found in all other workers compensation legislation in Canada.

These two subsections provide the Government with complete flexibility to determine those persons for whom it may choose to accept liability in the event an injury occurs when the person is performing voluntary work.

Since the Government assumes liability for compensation costs to those designated, it logically follows that Government make the decision on who should be designated.

If there is confusion on the part of stakeholders on this Issue, all that may be required is an enhanced communication program to ensure that those who might be considered under subsection 5 (2) are aware of the provision.

The Province of Manitoba amended their legislation in April of 2005 such that non-profit and charitable organizations now apply to the Board for coverage for volunteers and it is the Board that makes the decision on coverage.[32]

Options

1. Status Quo – no change to legislation
2. Amend the legislation such that non-profit and charitable organizations now apply to the Board for coverage for volunteers and it is the Board that makes the decision on coverage

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[32] http://web2.gov.mb.ca/bills/sess/b025e.php

Issue # 3 Terminations of benefits (4)

Background and Discussion

The current wording of subsection 8 (1) provides that "the board may suspend or reduce compensation payable to or in respect of a worker, if the worker" follows a course of uncooperative action and the actions are listed in the subsections (a) to (c).

The Issue is whether to amend the wording to clarify that under some circumstances the board is effectively terminating benefits when they are reduced to zero. Termination implies that no compensation would ever again be payable to the specific disability. Compensation means any amount payable or services provided under this Act in respect of a disabled worker.

The legislation in other Canadian jurisdictions is not totally consistent.

- The Alberta legislation is the same as the Yukon's;
- Legislation in NWT/Nunavut, Nova Scotia and Newfoundland/Labrador is clearer and states the compensation may be suspended, reduced or **terminated**;
- B.C. legislation provides the ability to suspend the workers right to compensation in similar circumstances and goes on to say that no compensation is payable when the right is suspended;
- The wording of the Manitoba and Saskatchewan Acts provide for "suspension of the right to compensation" for similar actions on the part of the worker however the legislation does not clarify that compensation is not payable during suspension of the right.

Options

1. No change to legislation
2. Amend subsection 8 (1) to add the word "terminate". This amendment would provide greater certainty to board adjudicative staff and the Appeal Tribunal. The change would be fully consistent with what exists in several other jurisdictions and what appears to be the intent of those who use the wording "suspend the right to compensation".
3. Amend Section 8 to state that the workers right to compensation is suspended if the worker takes the uncooperative actions listed and further that during the suspension – no compensation is payable. This would require greater amendment in the subsection to achieve the same effect as 1.

Issue # 4 Benefits during appeal period (5)

Background and Discussion

When an appeal process has a backlog of cases to be heard or is not timely, the delay can be devastating to workers. They can suffer severe emotional and financial hardships. A successful appeal, delayed by months or years, is often not viewed by the worker as a victory. During this time they may have lost everything meaningful in their life – their possessions, their family and their self-worth.

Long delays in the appeal process produce extreme animosity towards the workers compensation system and may result in rash actions by the worker or their family. A timely decision that brings certainty and finality is in the best interests of the injured workers emotional and physical well being and the system itself.

The request for continued payment of benefits during the appeal period is a direct result of an inefficient and untimely appeal process. This problem is not unique to the Yukon system.

To combat delay, some jurisdictions have placed time limits on each step of the review and appeal process. The time limits apply to both the worker's application for a review or an appeal and the length of time from application to a decision by the reviewer or appeal panel.

In British Columbia the appeal system was described as never ending, untimely and provided the opportunity for claimants to cycle through the appeal processes - this became know as the treadmill effect. Prior to passage of legislation placing time limits on the processes and reducing the levels of appeal, it was not uncommon for a worker to take 3 to 4 years to exhaust all levels of appeal. The delay in B.C. was also, in part, as a result of years of constraining resources for the appeal body.

A solution that is used in some systems in the U.S. for untimely initial adjudication of claims is a requirement to initiate benefit payments - without prejudice - if a decision has not been made within a legislatively defined period. This approach could be used in conjunction with legislated time frames for each appeal step.

Ontario is the only jurisdiction that provides for continuation of benefits once an appeal has been launched. This provision appears to set up a complex process. Workers benefits are terminated by the adjudicator. The worker then has to go through an internal review process and following the review may file an appeal with the Appeal Tribunal. Benefits are restarted when the appeal application is filed. There is a tight time frame for the appeal body to decide the matters and benefits could again be discontinued if the appeal is unsuccessful.

Options

1. No change to legislation.
2. Add legislation that provides strict time frames for each step in the review and appeal process. The legislation should include time limits on the application for a review or appeal in addition to existing time limits for decision makers to conclude the review or appeal. The success of this option would be dependent on the board and Appeal Tribunal being able to attract sufficient skilled resources. Recommended time limits are 30 days for **application** at both the review and appeal levels. Yukon regulation currently requires 30 days for decision at the review level and 45 days for decision at the Appeal Tribunal level. A worker who goes though both levels of review and appeal could still be without a

decision and benefits for about 4 months. Time frames on the other hand would limit employer liability where the employer is successful in appealing the claim.

3. Add legislation that provides strict time limits for each step in the review and appeal process. The legislation should include time limits on application for a review or appeal as well as existing time limits for decision makers to conclude the review or appeal.
3. Recommended time frames are 30 days for application at both the review and appeal levels. Regulation currently requires 30 days for decision at the review stage and 45 days for decision at the appeal stage. Include in the amendment that failure to conclude a review or appeal within the stipulated time frames would trigger a reinstatement of benefits - without prejudice – until a decision has been made. A worker who goes though both stages of review and appeal could still be without a decision and benefits for 4 months. Time frames on the other hand would limit employer liability where the employer is successful in appealing the claim.
4. Add legislation that restarts benefits to workers once they file an appeal application. Benefits would continue until a review or appeal decision is made. This option could add significant cost to the system – many more appeals are possible since a perverse incentive to appeal is created even if a successful appeal is unlikely. Complexity would be added to the system. Added appeals could increase the delay and backlog at the Appeal Tribunal and result in an unsustainable system.

Issue # 5 Limitation periods (9)

Background and Discussion

Subsection 10(1) of the Act requires that a claim for compensation be made in a form acceptable to the board within 12 months of the date of disability. Subsection 12 (2) provides the board with the ability to accept a late application.

Part of this Issue is dealt with in the recommended solution to Issue #4 above. Placing time limits on making a claim for compensation from date of disability is the second part of this Issue.

Almost all Canadian jurisdictions have time limits on filing a claim for compensation. However, the provisions vary considerably from 30 days to 24 months. Every jurisdiction has a clause which allows a waiver of the time limit. For some jurisdictions the legislated reasons for accepting late filing are vague; while others state that the grounds for late filing must be reasonable and justifiable.

Discretion currently exists in the legislation for the board to waive the time limits.

Options

1. No change to legislation
2. Amend the legislation to make it more specific. Such as: *the board may allow a late application providing the grounds for missing the deadline are reasonable and justified.*

Issue # 6 Commuting benefit payments (23)

Background and Discussion
The Yukon Workers Compensation Act does not provide for commutation of benefits. However, Board policy CL-53 passed on March 29th, 2005 does provide that for claims prior to 1992, a worker can apply for a lump sum payment of the periodic payment of benefits where the disability is less than 10% and the worker meets certain criteria set out in the policy.

Most WCB legislation in Canada provides for the commutation of periodic payments to a lump sum payment. Some jurisdictions have limitations in legislation on the amount that can be commuted (B.C., Alberta, NWT/Nunavut, Manitoba, and Saskatchewan).

Other Provinces (New Brunswick, PEI and Nova Scotia) provide almost complete discretion to the Board in the legislation. However, every one of these jurisdictions has comprehensive policy of the Board creating limitations for commuting periodic payments that are not dissimilar to those found in legislation in the other jurisdictions.

There are several reasons for restricting commutation. First and foremost is a concern for the worker's welfare. Commutation would defeat a key principle of workers compensation, which is to provide replacement income for the loss of earnings as a result of a workplace injury.

Any consideration of a commutation should require the board to ensure:

- that the worker's injury –related medical condition is stable;
- that the commuted amount is to be used for a purpose approved by the board (The purpose stated is often is that it be linked to vocational rehabilitation plan that is likely to succeed);
- that there are no other sources of funds accessible to the worker for the purpose stated for commutation;
- that the worker is not dependant on the wage loss benefit for the necessities of life currently and in the future.

Given the limitations that should exist in policy or legislation, requests for commutation require significant intrusion by the board in the workers affairs and complete disclosure on the part of the applicant. Such investigations often consume a lot of staff time.

In some other jurisdictions workers have been allowed to commute benefits to fund a business start-up. Often the experience has been that economy suffers a setback and the worker found they were disabled and without a source of income.

Commutation of small amounts makes good sense for both the board and the worker. Very small periodic payments are administratively costly and a nuisance to the worker. The policy of many boards provides almost automatic commutation approval for periodic payments that are below a certain dollar thresh-hold.

There are financial impacts to the accident fund if commutations are not limited in some way. Most jurisdictions use a higher discount rate (by as much as 2%) for commutations than is used in calculating the present value of the future liability. Excess investment income from the accident fund provides a subsidy to the cost of running the system and as such any reduction in the size of the fund can have significant effects on employer premiums.

Options

1. No change to legislation.
2. Amend the legislation to allow commutation and specify limitations of both the amount and use of the funds similar to those found in other jurisdictions.
3. Amend the legislation to eliminate the ability to commute benefits.

Issue #7 Awards for pain and suffering (24)

Background and Discussion

The introduction of a "special damage" award either as a specific component of the non-economic loss award or a new benefit provision would be unique in workers compensation in Canada. Such awards are found in the tort system in the courts.

Prior to the creation of workers compensation legislation workers made use of the tort system to sue employers for damages including special damages as a result of workplace injuries. Workers Compensation systems were founded on the basis of the "historic compromise". Workers gave up their right to sue an employer and employers agreed to pay for the costs related to workers injuries regardless of fault.

All workers compensation systems in Canada are based on the principles of this agreement between workers and employers. The Canadian WCB systems provide a dual payment approach; the worker receives payment for replacement of wage-loss and a non-economic loss payment related to the degree of permanent impairment.

The non-economic loss amount is intended to provide a benefit that includes payment for disfigurement, pain and other factors that are not related to wage loss. Pain is normally evaluated as a component of the disability when the function impairment assessment is carried out. The percent disability is added to the pain component to determine the total disability.

Options

1. No change to legislation
2. Amend the legislation to provide the Board with discretion to pay compensation for special damages as a component of the non economic loss award.

Issue # 8 Maximum non-economic loss awards (25)

Background and Discussion
Section 34 of the Act stipulates the compensation award for permanent impairment. The amount is indexed according to wage inflation using 1993 as a base year. The formula ensures the award maintains its relevancy to the average weekly wage. Unlike many other jurisdictions there is no cap on the percentage increase.

The Yukon's maximum award is vastly superior to all other jurisdictions in Canada with the exception of Manitoba. The maximum award in 2003 for a Yukon worker who suffered 100% impairment and was 45 years of age was $86,285. The similar provision in Manitoba is $111,020. In 2003 a young Yukon worker (18-25) would have the maximum 40% increment due to age and would receive a non-economic loss award of $120,800.

Manitoba's new legislation eliminates the age-related reduction of a permanent impairment award (2% for every year a worker is over 45 years of age).[33]

All of the systems in Canada are "dual award" based. There is a component for non-economic loss and a loss of earnings component. In order to compare jurisdictions, it requires an examination of the overall compensation package. For Example: The maximum monthly **loss of earnings** component of compensation for the year 2003 was $2,941.98 in Manitoba compared to the Yukon's maximum monthly loss of earnings payment of $4,068.75. The Yukon maximum monthly loss of earnings benefit is superior to any other Canadian jurisdiction.

If a 45 year old worker with 100% impairment receives an annuity from the maximum **non-economic loss** award we can add this to the loss of earnings award to establish the total compensation package.

To establish the monthly annuity payment a simple annuity chart from a major financial institution was used to for calculation purposes. The maximum non economic loss award in the Yukon would provide the worker a monthly annuity payment of about $380 compared to about $490 with the maximum Manitoba award.

Combining the **non-economic loss annuity payment** and the **loss of earnings award** provides the comparison of the maximum tax free compensation a worker receives in each jurisdiction. A Yukon worker with maximum impairment would receive about $4,448/month compared to $3, 432/month for the same impairment in Manitoba.

The Yukon total compensation package is about 30% higher than Manitoba's.
Given this comparison and the generous indexing formula it is difficult to rationalize an increase in the maximum non-economic loss award.

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[33] http://web2.gov.mb.ca/bills/sess/b025e.php

Some stakeholders have suggested an increase in the maximum award to $120,000. Such an increase would add about $197 per month in annuity income for a worker at age 45 with 100% impairment. The Yukon board staff and actuary would have to evaluate the added cost and the impact on assessment rates.

Options

Maximum Non Economic Loss Award

1. No change to legislation.
2. Amend the legislation to increase the base amount of the award. It was suggested that the amount be raised to $120,000.
3. Amend the legislation to decrease the base amount of the award. $60,000 is near the average of all Canadian jurisdictions.

Indexing of Non Economic Loss Award

1. No change to legislation
2. Amend the legislation to revise the indexing formula. For example, increase the base by the annual Canadian CPI less 1%, with a minimum annual change of 0% and a maximum change of 4 %.

Issue # 9 Compensation for loss of personal property – amount (26)

Background and Discussion
Section 35 of the Act provides that - **If** a worker has suffered a work related disability and is entitled to wage loss compensation pursuant to Section 36 **and** has also suffered a loss of or damage to personal property in the accident that caused the disability, the board may pay to the worker, compensation for that loss or damage set by order of the Board (policy). Current Board policy places a limit of $200 on such payments.

Options

1. No change to legislation
2. Amend the legislation to specify a limit and a formula to index it.

Issue # 10 Compensation for loss of personal property – triggers (27)

Section 35 of the Act provides that - **If** a worker has suffered a work related disability and is entitled to wage loss compensation pursuant to Section 36 **and** has also suffered a loss of or damage to personal property in the accident that caused the disability, the board may pay to the worker, compensation for that loss or damage set by order of the Board (policy).

The wording of these two Sections appears to result in a payment for loss or damage of personal property only being "triggered" when the worker has a **lost time** injury as a result of a work-related disability.

Legislation in some Canadian jurisdictions pay the cost of replacement or repair of a list of personal property articles (clothing, dentures, eyeglasses, artificial eyes or limbs, or hearing aid) when they are lost damaged or destroyed as a result of an accident which may or may not include an injury or a lost time injury. Some Provinces have variations of this theme.

Care will be needed in dealing with this Issue to avoid creating some kind of incentive to use the compensation fund for replacing items broken or needed replacement through normal wear and tear. There could be an impact on costs, both claims and administrative.

Options

1. No change to legislation
2. Amend the legislation to allow for compensation for loss of or damage to personal property as a result of a workplace accident/incident.

Issue #11 Pay on day of injury (28)

Background and Discussion

The Yukon's Act has no provisions for this Issue. No other legislation in Canada has a provision for the system to pay **wage loss** compensation on the day of injury.

Some jurisdictions (Alberta, Manitoba, Ontario, Newfoundland/Labrador, and Quebec) have provisions that require the employer to pay full wages on the day of injury.

The complexity and administrative cost of determining what portion of the injury day should be paid by the system is significant and is likely the reason no jurisdiction has this provision. If such a provision were added to legislation, employers would be paying for the fractional time loss for the injury day. Additionally, this would add significant administrative burden and cost all of which would have to be paid by employers. Workers would be ensured of pay continuity.

The legislation could be amended to clarify for the board and stakeholders that wage loss payments begin the day following the day of the injury. This would be consistent with most other legislation and also mean that injury rate calculations would continue to be comparable to past years.

The legislation could also follow the example of those boards that require the employer to pay full wages on the day of injury regardless of the number of hours worked prior to the injury. The majority of employers, especially those with collective agreements will likely already be paying the full wage on the day of injury.

This provision was included in the 1973 and 1986 Acts but was left out of the 1992 Act.

Options

1. No change to legislation.
2. Amend the legislation to add Sections that state wage loss payments by the board begin the day following the day of injury and also that require the employer to pay the worker full wages on the day of injury.
3. Amend the legislation to add a Section that requires the board to pay wage loss from the time of injury on the day of injury.

Issue # 12 Claims costs (74)

Background and Discussion

The Auditor General's report flagged a concern about increasing claims costs.
Claim costs are driven by several factors. The major drivers are:

- legislated benefits;
- frequency of lost time injuries or injury rate (number of lost time injuries/ 100 person years of work);
- the average duration of lost time claims in the system;
- the proportion of complex claims in the mix of claims presented for compensation.

The Board has stated that they are working on the key areas under their control that could over time reduce or at least minimize increases in claim costs. Employer assessment rates without the subsidy included can be used as a surrogate to benchmark the total cost of the system. Continuing to benchmark assessment rates in the Yukon against other Canadian jurisdictions will provide an early warning that the claim costs in the system are out of step with the rest of Canada

Government decides the benefit components and thresholds. Currently the Yukon legislation provides among the highest benefit package for injured workers. Wage loss is provided at 75% of gross income – every other Canadian jurisdiction uses a percentage of net income. There is no waiting period in the Yukon prior to the start of wage loss benefits. Some Canadian jurisdictions have a waiting period of 3 days when no wage loss benefits are paid. The maximum non-economic loss payable in the Yukon is the second highest in Canada. One means of reducing claim costs is to reduce benefits.

The injury rate can be reduced by a proactive prevention strategy supported by sufficient skilled resources. At the moment the Yukon has the lowest injury rate of all jurisdictions that do not have waiting periods in Canada. There appears to be less opportunity for large immediate reductions in injury rates in the Yukon and benefit from the associated reduction of claim costs.

Similarly, the Yukon's reported average duration of lost time injuries for 2003 was the lowest in the country. Of concern however is that the Board reported in "Working Together on Prevention" that the duration for 2004 has dramatically increased. Aggressive disability management programs incorporating modified return to work initiatives as well as a healthy collaborative effort between the board staff, medical practitioners, employers and the injured worker might produce lower duration and some reduction in claims costs.

The ratio of complex to straight forward claims has been increasing in all WCB systems. The key tool to prevent duration from increasing as a result is to have skilled, knowledgeable claims managers. Recruiting and retaining skilled professionals in the key positions will assist in providing adequate and timely service to injured workers. This could result in controlling the increase in duration as a result of claim mix and could contain or reduce claims costs.

A simple jurisdictional comparison of claim costs was calculated for the year 2003. Benefit costs incurred were divided by the number of claims reported.
The average for all jurisdictions was $7,850 in benefit costs per claim reported.
The range across the country is very broad from the lowest, $3,616 in Manitoba to the highest $12,318 in Quebec.
The Yukon had a ratio of $10,529 in benefit cost per claim reported.

Only Quebec was higher than the Yukon and other smaller jurisdictional comparisons were Newfoundland and Labrador at $9,476 and NWT/Nunavut at $7,465.

Options

1. No change to legislation.
2. Amend the legislation to reduce benefits so they are more consistent with other jurisdictions in Canada. Benefit levels in the Yukon system are the largest component of overall cost. Changing wage loss replacement to 80% of net average earnings and placing a threshold on the amount of Vocational Rehabilitation that can be provided will significantly reduce claim cost. The calculation of 80% of net earnings should be formula driven to reduce complexity of individual taxation status. (The board staff would have to quantify the reduction in cost) An 80 % net wage loss replacement combined with the 10% set aside for an annuity will mean that a severely disabled worker, over the long term, receives almost the equivalent of current take home pay. Injured workers with short duration injuries would have reduced levels of compensation. For example: A worker earning $60,000 a year would experience a reduction of about $175.00 per week from the current benefit levels.

Issue # 13 Calculation of wage loss benefits (29)

Background and Discussion

The Act defines earnings as follows:

"earnings" includes salary, wages, commissions, tips, remuneration for overtime, piece work and contract work, bonuses and allowances, the cash equivalent of board and lodging, store certificates, credits, directors fees, indemnities and allowances paid to members of the Legislative Assembly, and any substitute for money but does not include any amount received for expenses incurred by the worker because of the worker's employment;

Subsections 36 (1) and (2) of the Act provide that an injured worker's compensation will be 75% of the worker's weekly loss of earnings and that the manner and method of making payment will be determined by the board.

By Board policy the Yukon system provides 75% of the workers **gross** rate of pay at the time of injury for the first 180 days (approximately 26 weeks) and thereafter at 75% of the average gross weekly pay calculated for the best consecutive 12 months earnings in the previous 24 months.

Every WCB jurisdiction in Canada has different rules for calculating wage loss. Several jurisdictions have rules that provide either a step-up or step-down in the percentage to be used at some period following the date of injury. All jurisdictions recalculate the likely long term earnings rate at a specified time in the claim duration.

Should wage loss be calculated as a percentage of gross pay or net pay?

All jurisdictions other than the Yukon use a percentage of **net pay**. For the jurisdictions using a net pay system certain deductions such as income tax, CPP and EI are made to calculate the net pay. Depending on the jurisdiction the wage loss benefits range from 75% to 90% of **net pay**.

The question of whether the system is/was intended to provide "full" as opposed to "fair" economic protection to workers often arises. Historically the systems in Canada and around the world have not provided full economic protection. All systems at their inception provided wage loss replacement payments which ranged from 66 2/3% to 75 % of actual wage loss. In the first 30 or 40 years of workers compensation systems in Canada there were no deductions for income tax, employment insurance or the Canada Pension Plan as such the wage loss payment was both a percentage of the worker's take home pay and net pay.

The Yukon is the only Canadian jurisdiction that continues to provide wage loss replacement on the basis of 75% of gross earnings. It has been calculated that dependent on tax rates, CPP and EI deductions a 75% of gross earnings approach provides the majority of injured workers with greater than 100% of net pay and as such provides more than full replacement of economic loss for most workers.

As the Yukon workers compensation system is based on 75% of gross, higher income injured workers receive the most generous benefits in Canada. However, lower income injured workers may receive less than in other jurisdictions in Canada.

All other Canadian, American and Australian systems have opted to provide less than full economic loss replacement and in some cases it is substantially less.

The difficulty in switching to a net based system is the amount of administrative effort required to determine each individual's net pay because of their different taxation status.

In order to simplify the calculations, each jurisdiction using a net based system uses slightly differing approaches to overcome some of the administrative burden.

Most jurisdictions, when calculating net pay, use a formula approach which reduces administrative burden somewhat but also results in inequitable outcomes for some workers. The legislation in most Canadian jurisdiction require the Board establish a schedule each year which sets out the deductions for income tax, CP and EI to be made from a worker's gross earnings to establish their net earnings.

Each jurisdiction uses a formula to reduce administrative complexity in the calculation of income tax that is reasonably equitable but not exact for each individual's circumstances. The most common is 1.5 times the worker's basic personal exemption – to be used for all workers. Although this change would reduce employer's premiums it might be seen by workers as a significant attack on benefits.

When a 90% net pay calculation is adopted, the added administration cost can easily offset any savings to the system overall. The change is usually made purely for optics and not to save cost. If a jurisdiction wishes to reduce overall cost, the decision is a move to an 80% or 85 % of net pay calculation.

Options

1. No change to legislation
2. Amend the legislation to provide that loss of earnings compensation will be based on 80% of a workers weekly net earnings from all employment.
3. Amend legislation to base the gross/ net calculation on alternate percentages to those provided in Options 1 and 2.

Issue # 14 Average weekly earnings (86)

Background and Discussion

All systems struggle with the Issue of the fairest way to establish average earnings.
There are really 3 main alternatives:

- the daily, weekly or monthly wages or other regular remuneration which the worker was receiving at the time of injury – the worker's actual rate of pay;
- the average yearly earnings of the worker for one or more years prior to the injury;
- the probable yearly earning capacity of the worker at the time of injury.

Most jurisdictions provide a very broad discretion in determining which alternative to use and at what stage in the workers recovery phase.

At the outset of a claim the workers **actual rate of pay** provides the fairest representation of the workers actual loss and is used as the basis of remuneration by all jurisdictions.

All systems reassess the rate at some point in the future as a claim continues.

The reassessment of average earnings should occur within a reasonable time frame following the initial fixing of the workers pay rate, but not so soon after that a reassessment must be made for every worker. The reassessment is administratively time consuming and will cause costs to rise if done too early.

The elapsed time at which reassessment is conducted varies widely across the country from 10 weeks to 24 months. The Yukon system is at the longer end of this spectrum using 180 days or about 26 weeks as the reassessment date. This method of calculation prescribed by Board policy provides for clear direction and consistency of application.

Section 117 of the Act provides the Board with the discretion to determine the period of time it considers fair and just to calculate "average weekly earnings".

Although the data is not available on the exact Yukon experience, in general most jurisdictions find that less than 10% of the initial claims remain open at the end of 26 weeks. For those workers who remain on benefits beyond the first 26 weeks the fairest and best representation of actual loss requires the reassessment of the average earnings.

The Yukon policy states that the adjudicator will, on reassessment, determine the average rate of pay the worker earned for the best consecutive 12 month period in the 24 months prior to injury. The policy provides for clarity of direction and consistency in how the board will calculate the long term rate.

There will be circumstances where an exception needs to be considered when establishing a long term rate. The circumstances should be outlined in Board policy.

Should EI benefits be included for the purpose of calculating average earnings?

If a system includes the time on EI benefits within a 12 month period and not the amount of EI received when reassessing the worker's average earnings then the worker's average earnings rate is understated.

Some jurisdictions have dealt with this Issue by including both the time on EI and the EI benefits in the calculation, but **only where there is an established pattern of regular use** of EI as a source of income **and where it is determined that this pattern would likely to have continued** into the future.

This provision covers workers who are employed in an occupation or industry which, as determined by the board, is expected to result in recurring seasonal or temporary interruptions in employment.

Maximum Insurable Wage

One stakeholder was concerned about long-term compensation for high income earners when their income is greater than the maximum insured compensation rates at the time of injury. Premiums collected for high income earners only insure to the maximum level set by statute in any given year. When an injury occurs in a particular insurance year the only compensation that can be paid is on the insured level of earnings. All insurance systems are based on the level of benefits insured in the insurance year and adjusting benefits to higher levels as the maximum insurable earnings increased would mean providing benefits for which no premiums were collected.

With the exception of Manitoba, all jurisdictions set a maximum insurable wage level. In an amendment to legislation in April 2005, Manitoba removed the ceiling for maximum insurable wages.

Options

1. No change to legislation
2. Amend the legislation to include the current timeframe established by board policy for calculating the short term rate for the first 180 days based on hourly, daily, weekly earnings and the long term earnings rate, which uses the best 12 consecutive months of earnings in the 24 month period prior to the date of injury.
3. Amend the legislation to include the timeframes different than proposed in 2.
4. Amend the legislation to entrench in legislation that if the calculation for the Short-Term or Long-Term Benefit does not provide a reasonable representation of a worker's loss of earnings, the board shall use the average of earnings of other workers: in a similar Yukon occupations; or if a Yukon comparison cannot be made, then in a similar occupation within Canada

Issue # 15 Earnings (87)

What constitutes earnings?
Earnings are defined in the Act as including salary, wages, commissions, tips, remuneration for overtime, piece work and contract work, bonuses and allowances, the cash equivalent of board and lodging, store certificates, credits, directors fees, indemnities and allowances paid to members of the Legislative Assembly, and any substitute for money but does not include any amount received for expenses incurred by the worker by reason of the worker's employment.

Should Employment Insurance (EI) and other benefits from Government programs a worker receives be used in calculating earnings? EI, CPP, Social Assistance, and WCB benefits are not characterized as insured earnings for WCB purposes since assessments (insurance premiums) would not have been paid on these items. It would be impossible to estimate the amount of these benefits that workers from an individual firm would receive and include the amount in the assessable payroll.

No Canadian jurisdiction includes CPP or other benefit plans, such as the premiums the employer pays for extended medical or dental plans, as income for the purpose of establishing average earnings.

However, the premiums employers pay for providing the insurance coverage for these other benefit plans could be included in the assessable payroll. If this step was taken then injured workers could have their weekly wage loss benefits enhanced by the amount of the weekly premiums the employer paid for the benefits.

A separate Issue is whether a worker who normally carries out household expense reduction activities such as hunt wild game and cut firewood in order to reduce the cost of living should be compensated for the loss of ability to perform these tasks when the worker suffers a workplace related lost time injury. No Canadian jurisdiction provides for benefits from non employment related activities to be included as earnings.

For those persons who supplement their income with food gathering activities it would be difficult to provide benefits because no premiums are collected to insure this "work". It may be argued that it would be unfair to charge employers added assessments to cover the replacement cost of these benefits even though it is the workplace injury that prevents the worker from enjoying the economic benefit of these activities.

Options

1. No change to legislation.
2. Amend the legislation to allow for benefits from Employment Insurance to be included as earnings, for specific industries and specific circumstances, as defined by the Board.
3. Amend the legislation to allow for the benefits of other government and non-government programs to be included as earnings for specific circumstances, as defined by the Board.
4. Amend the legislation to allow workers who carry out household expense reduction activities to purchase optional coverage in the amount they can justify

Issue #16 Vocational rehabilitation benefits: should they be based on s. 36 or s.37? (30)

Background and Discussion

Subsection 36 (1) of the Act provides that an injured worker is entitled to compensation in an amount equal to 75% of the workers weekly loss of earnings; subsection 36 (2) provides the board with complete discretion on the method and manner of making the payment.

Because of the discretion given to the board in subsection 36 (2), Board policy interprets and specifies how the compensation is calculated and how it is paid (method and manner).

For example: Board policy interprets the amount (75%) as a percentage of gross pay when it could easily be interpreted as a percentage of net pay. Similarly Board policy decided that fair loss of earnings compensation will be the average weekly rate of pay at the time of injury **for the first 180 days** of wage loss and **thereafter** a weekly rate based on calculating an average based on the best consecutive 52 week period (12 months) in the previous 24 months.

It seems that subsections 37 (a) and (b) could be the cause of confusion. **If subsection 37(a) is read alone** it states that the average weekly wage is based on the average rate the worker earned for the week immediately preceding the injury. However, subsection 37(b) states that if there is a disability the amount the worker could, **in the board's opinion**, earn from time to time in a suitable occupation after the disability arose. Subsection 37(b) gives the Board the discretion to determine by policy how it calculates the amount the worker could earn. At the moment policy states the rate to be used for the first 180 days is based on the workers earnings on the day of injury. Policy also provides that the rate be recalculated after 180 days, which depending on the worker's employment history, the rate could be the same, greater or less.

No other jurisdiction in Canada has specific legislation on the rate that is paid while a worker is taking vocational rehabilitation (VR). In practice, it appears that the rate paid in other jurisdictions is whatever existed on the day the Vocational Rehabilitation program began and if necessary readjusted to the long term rate at the time specified in policy or the deemed earnings. The Yukon policy does not appear to be out of step with that in other jurisdictions.

Options

1. No change to legislation.
2. Create a section in legislation that links the benefits while on vocational rehabilitation to the rates set out in short and long term rates as discussed in Issue 14 "Average Weekly Earnings (86)".

Issue #17 Different minimum compensation levels (33)

There are three different minimum levels of wage loss compensation. First, the compensable minimum wage level for volunteers and others designated as workers employed by the Government of the Yukon is spelled out in legislation (subsection 5 (3)) as being the greater of the worker's weekly average earnings or one-half the maximum wage rate in effect at the time of injury. Using the present maximum weekly wage loss payment of 75% of $67,000 which is $50,250, this would mean at least $25,125

Second, Section 40 provides that the Board, by order will set the minimum level of wage loss compensation for workers. Presently the Board Order states: 75% of earnings over $16,000, 100% for earnings of less than $16,000 and for those earning over $16,000 but less than $21,334 there is a minimum of $16,000 for full time employment.

Third, personal optional protection insurance and the minimum insurable amount are set by board policy. Currently the policy sets this at $14,000. Individuals who purchase optional coverage must still demonstrate proof of "net income".

There would continue to be three different minimum wage loss compensation levels unless by order/policy the Board decided workers and Personal or Optional coverage would be at the same level. Individuals with optional coverage have the choice to increase their minimum to whatever level they choose between $14,000 and the maximum of $67,000(subject to proof of earnings). Volunteers and other persons designated to be workers of the Government of the Yukon would continue to have a minimum wage loss benefit level that was about twice the minimum for all other workers. Any change to the minimum level for workers (Issue # 18) can be achieved by amending Board Order.

Whether there are 3 different insurable wage loss rates or two is within the discretion of the Board since the Board can, by order and policy, have the same or different minimum rate for workers and personal optional protection.

Provisions in other Canadian jurisdictions vary considerably for volunteers and others designated as government employees. Some legislation merely states the Board has discretion to set the minimum. Others are more specific and include the following:

- the minimum wage in the Province,
- ½ the average industrial wage,
- some jurisdictions state the amount in legislation.

What seems to be common is that all systems will use the person's actual earnings from all employment at the time of injury or where there were none, the minimum level set by legislation or policy.

Options

1. No Change to legislation.
2. Amend the legislation to state that the minimum wage of those persons designated as workers of the Government of the Yukon shall be the greater of their average weekly earnings or a minimum amount set by the Board. This amendment would allow the Board the discretion to make all three rates the same or different by order or policy. Should the Board policy use the current minimum for all workers then there would be a significant reduction in the minimum for volunteers and others designated when the person had no other earnings.

3. Amend the legislation to ensure the same minimum compensation rate for all workers, Personal or Optional Coverage and those designated as workers of the Government of the Yukon. The legislation could either state the minimum compensation rate or provide that the Board will have discretion to set the rate.

Issue #18 Minimum compensation levels (34)

Background and Discussion

Section 40 Minimum Compensation for total disability states "The board may prescribe, by order, a minimum amount of compensation, based on full-time employment, to be payable to a worker who suffers a total disability."

Currently, the Board Order states: 75% of earnings over $16,000, 100% for earnings of less than $16,000 and for those earning over $16,000 but less than $21,334 there is a minimum of $16,000 for full time employment.

Those Boards who have minimum compensation levels vary from $443.43 per week in NWT/NU to $225.72 per week in Quebec. Five jurisdictions do not have set minimum compensation[34]. (See Appendix- Weekly Benefits for Temporary Disability – Summary 2003)

Minimum compensation rates are generally used to ensure that workers who become totally disabled as a result of a workplace accident do not become burdens to the state or their families. Some consideration could also be given to historical earning patterns

Options

1. No change to legislation.
2. Amend the legislation placing a specific amount based on;
    a. Poverty level
    b. Minimum wage
    c. other

3. Amend the legislation designating no minimum level

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[34] AWCBC Maximum and Minimum Compensation rates table 2003

Issue #19 Annuities (35)

Background and Discussion
In the case of permanent impairment, the majority of WCB schemes in Canada provide injured workers with loss of earnings replacement to age 65 and also set aside an additional sum which is between 5% and 10% of the loss of earnings benefits paid to the worker.

The Yukon legislation is at the high end of the range requiring the board sets aside 10% of the earnings replacement benefits paid to the worker.

At age 65 when the loss of earnings payments cease, the accumulated money and interest earned is used to provide the worker with an annuity.

By policy, the Yukon Board states that if the injured worker dies all monies set aside will be paid out to dependents as a lump sum.

Dependents are defined in the Yukon Workers Compensation Act in such a way that it precludes payment to the workers estate

Those jurisdictions that pay a lower percentage and allow the worker to contribute a matching amount, such as B.C., will pay the accumulated sum to the worker's estate if there are no dependents.

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The money set aside is clearly to provide income for the worker beyond age 65 or to the worker's dependents (a member of the family who was wholly or partially dependent on the workers earnings) in the event the worker dies.

If the worker's estate became entitled to the monies set aside, it could be contrary to the objects of the Act subsection 1 (a) which is "to provide for an open and fair system of compensation for all **workers and their dependents** for work related disabilities" and also contrary to the rationale for setting aside these amounts.

If the money set aside and the interest were paid to the worker's estate and the worker dies without a will, the estate would be distributed according to common law and could provide payment to persons who are not dependents as defined in the Act. Similarly the worker could provide in a will that the estate is paid to a charity or a friend or acquaintance and that is clearly not what was intended when the concept of the annuity is to provide income for a worker post age 65.

The Yukon Injured Workers Alliance argues the injured worker should control the money set aside for an annuity and be able to use that money in whatever manner they choose.
Allowing a worker control of the monies set aside could defeat the purpose of setting the funds aside – which is to ensure a level of income post age 65.

The board has an obligation to inform and educate the worker about the various annuities that can be purchased and to assist/advise on the best option given the workers individual circumstances.

Options

1. No change to legislation.

2. Amend the legislation to allow payment to the worker's dependents or in the event there are none as defined in the Act, the worker's estate.
3. Amend the legislation to allow payment of the 10% to a locked in investment plan in the name of the worker and of a type broadly prescribed by the Board policy. This would allow policy to set the parameters for a low risk investment scheme and which also ensured no access to the funds prior to the worker reaching age 65 or dying.

Issue # 20 Rehabilitation assistance for incidental costs (37)

Background and Discussion
All Canadian jurisdictions except two provide complete discretion for the Board to set by policy the incidental expenditures allowed for rehabilitation. The Yukon Board has complete discretion to state in policy the type and amount of incidental expenditures allowed for rehabilitation. The specific Issues raised either have been or could be dealt with by Board policy.

The only alternative to the broad discretion now granted the Board would be to provide a specific list of incidental benefits in the legislation which could be provided when a worker is attending clinical rehabilitation. Amending legislation for items that change over time is a poor strategy as the flexibility to respond to change is constrained.

Options

1. No change to legislation
2. Amend legislation by prescribing allowable incidental costs and the maximum for each item.

Issue # 21 Maximum wage and assessable earnings rates (82)

Background and Discussion

The objective of setting a maximum insurable wage rate is to ensure that approximately 90% of all workers covered by the system have fully insured earnings. All jurisdictions utilize a **common** maximum insurable wage rate and maximum assessable wage rate.

The maximum compensable earnings level is indexed to changes in the annual average wage rates. The maximum assessable earnings and the maximum compensable earnings are the same amount. These provisions are consistent with other Canadian jurisdictions.

Manitoba amended their legislation in April of 2005 to remove the cap on maximum insurable earnings.[35]

Where there is a cap on the maximum insurable earnings in Canada there are two main methods used to annually adjust the maximum insurable/compensable rate. One method is to tie the annual adjustment of the maximum insurable/compensable wage rate to the Canadian consumer price index(CPI) so that the rate moves up or down with price inflation. The second method used by more jurisdictions is to adjust the maximum to the Statistics Canada annual measure of average wages. Either method uses the prior year's data.

Almost all jurisdictions have moved away from having a stagnant maximum insurable wage rate for several years and then introducing a dramatic increase. This approach under-compensates an increasing number of injured workers over time and when adjusted there is a shock to the whole system. Employers WCB payments increase significantly and those workers injured just prior to the change feel unfairly treated.

The Yukon Workers Compensation Act amendments in 1993 provided for four differing methods to be used over the next decade to bring rates up to an appropriate level.
From 2004 on, the Yukon's Act provides an indexing formula which is based on the average wage rate for the year divided by the average wage rate in 2003.

The assessment of earnings when a worker or a Director has earnings from multiple firms.
It is possible that when a worker is employed by several employers at the same time or when a Director is compensated by several firms that the total amount of the assessed earnings is greater than the maximum allowable compensable earnings. This condition appears to also occur with regard to CPP and EI as it relates to payments by the employer. The workers are rebated on overpayments at the end of the year through their tax return.

The number of instances where this occurs is not known.
Legislation in other Canadian jurisdictions does not deal with this Issue.

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[35] http://web2.gov.mb.ca/bills/sess/b025e.php

A company director who can document the excess assessment, appear to have two options in the Yukon legislation available to appeal the apparent excess assessment. They can apply to the Board for an exemption or they can appeal the assessment to the Board.
It would be an impossible task for the administration of the board to know when instances of excess assessment occur for these situations and take any proactive action.

Options

1. No change to legislation
2. The legislation could be amended to remove the cap on maximum insurable/compensable earnings as Manitoba has just done. This option would eliminate the Issue of over assessment and under compensation for Directors and workers with earnings from multiple firms. Because there would be no maximum, employers with workers earning greater than the current maximum would have an increase in their WCB payments.
3. The legislation could be amended to provide a different indexing formula that is based on changes to the CPI (this could be the Canadian CPI or the Whitehorse CPI) and could include caps on the percentage or a deductible before CPI adjustment is made. Alternately, the annual adjustment could be based on Statistics Canada's annual measure of wages.
4. The legislation could be amended to adjust the maximum to a percentage of Statistics Canada's annual measures of wages for the Yukon.

Regarding the Issue of assessment of earnings when a worker or a Director has earnings from multiple employers.

1. No change to legislation
2. Amend the legislation to allow employers the ability to apply for an assessment rebate based on occurrences of a worker's multiple earning sources which exceed the maximum insurable earnings.

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[38] http://www.labour.gov.bc.ca/labr_pub.htm

APPEALS PROCESS, LEGAL AND POLICY ISSUES (1-24)

Issue #1 Process to lodge administrative complaints (1)

Background and Discussion

Several Canadian WCBs have created an internal ombudsman or WCB complaints commissioner that reports administratively to the President and on Issues of substance to the Board. Manitoba was the first jurisdiction to create a complaints commissioner office in 1991 and in April of 2005 strengthened the position by introducing in legislation a duty for the Board of Directors to appoint a Fair Practices Advocate, who may investigate and make recommendations on matters in which employers, workers or dependents may be aggrieved.

British Columbia introduced the concept of an Internal Ombudsman (now called complaints commissioner) in 1996. Ontario and Saskatchewan followed with similar offices. The B. C. WCB complaints commissioner assisted both these provinces to set up their standards for complaint investigation, Issue tracking system and complaint resolution methodology. Nova Scotia and Prince Edward Island have less formal versions of this function.

The model seems to be working effectively in that it is seem as fair, impartial and timely in resolving complaints and disputes. The complaints commissioner's office also provides the organization with an early warning of Issues related to the application of new or revised policy.

Currently in the Yukon complaints that are violations of Legislation specifically objections to the claims, assessment and OH&S decisions have direct access to an appeal process. Process or treatment of workers or employers can be advanced to the board employee's supervisor or should the complaint relate to the conduct of the President it should be referred directly to the Chair of the Board. If the complaint remains unresolved the individual may pursue the Issue with the Yukon Ombudsman Office.

A small jurisdiction such as the Yukon could consider having a part-time complaints commissioner position, conjoin the function with other non-conflicting duties for an existing staff member or assign the function to one or two Board members.

The majority of complaints in B.C. are claims related matters. Compared to the Yukon, B.C. processes about 200 times the volume of claims and the complaint commissioner's office handles about 1700 complaints per year. The expected volume of complaints in the Yukon could therefore be in the range of 1 or 2 per month.

The B.C. Complaints Commissioner has in the past (at no cost other than travel expense) provided charter and process documentation and training to other smaller WCBs and may be available to assist the Yukon Board.

Options

1. No change to legislation
2. Amend the legislation to require a process for the Board to handle administrative complaints and a time frame for resolution.
3. Refer complainants to the Yukon's Ombudsman.
4. Create an internal ombudsman or complaints commissioner position reporting to the Board of Directors.

5. Assign the duties of complaints commissioner to one or two members of the Board of Directors.

Issue #2 Recourse to review Worker's Advocate decisions under s. 13 (3). (7)

Background and Discussion

Section 13 of the Act provides for the appointment of a workers' advocate. Subsection 13(2) provides a list of advisory functions the workers' advocate may provide. Subsection 13(3) provides the workers' advocate with the ability to refuse to carry out the functions described by subsection 13(2) for specific reasons and subsection 13(4) requires the workers' advocate to provide written reasons for any refusal to advise/assist.

The Issue is whether the worker has any recourse to appeal or have reviewed a refusal by the workers' advocate.

In the Yukon and all other WCB jurisdictions in Canada, the worker's main recourse is to file a complaint with the Province or Territorial Ombudsman's office. It may be however, that all workers are not aware of this option. A solution to the awareness problem might be for a directive from the Minister or a legislative amendment that requires the Workers' Advocate, in his written refusal, provide the worker with the contact information for the office of the Yukon Ombudsman and advise the worker that he/she could, if not satisfied with the reasons, file a complaint. A worker has the option to complain to the Deputy Minister of Justice to whom the Workers Advocate Office reports.

Workers Advisors offices in B.C. have the same Issue on occasion. Their office advises that the worker will often continue the appeal by themselves and/or contact the Ombudsman's office requesting advice on whether the decision is fair and reasonable.

Options

1. No change to legislation
2. The Minister could direct the workers' advocate to advise the worker in the written refusal letter of the contact information for the Yukon Ombudsman Office.
3. Section 13 of the Workers Compensation Act could be amended to add a provision that the Workers' Advocate shall advise the worker of the contact information and ability to complain to the Ombudsman in the written reasons required under subsection 13(4).

Issue #3 Decisions must be in keeping with Act and policy (10)

Background and Discussion

It is common in Canadian WCB jurisdictions for all decision makers in the system, including the appellate body to be bound by the Board's policy. The Yukon Workers Compensation Act binds the Appeal Tribunal and the Appeal Panel to policies of the Board providing they are consistent with the Act. The President is responsible under subsection 116(1) (b) to implement board policies and as such binds decision makers reporting to the President.

Some jurisdiction's legislation states explicitly that every officer and employee is bound by the policy of the Board.

Appeal Tribunals are set up with either supervisory or substitutional authority.

Supervisory authority places limits on the Tribunal's decisions. In hearing a case the Tribunal may identify Issues which, although they may not constitute an error of law or contravention of Board policy, the Tribunal believes were wrongly decided based on the circumstances of the case before it and yet it is unable to correct the error because its authority is limited to supervisory. Substitutional authority provides the Tribunal with the ability to consider new evidence and correct Issues that are not errors in the application of law or Board policy.

The Yukon's Act provides several checks points in the decision and appeal process. This establishes the opportunity to challenge and /or correct errors in law or policy.
For compensation Issues, once a final decision is made by an adjudicator the worker may request a review by a hearing officer and challenge the application of policy or law during that review. The hearing officer is bound by board policy and it is unlikely that a decision will be inconsistent with policy however, that does not mean the policy is consistent with the Act.

A hearing officer's decision may be appealed to the Appeal Tribunal where the applicant can argue that the policy applied is not supported by or is not consistent with the Act. Since the Appeal Tribunal has substitutional authority, it may make decisions it believes were wrongly decided based on the evidence and/or where it believes there was an error in application of law or policy. Since law takes precedence over policy, the Tribunal may decide that its decision is consistent with and supported by the Act even though the policy is contradictory.

Subsection 24(8) of the Act provides that "if the members of the Board consider that an appeal committee has not properly applied the policies established by the Board, or has failed to comply with the provisions of the Act or regulations, the members of the Board may, in writing and with reasons, direct the appeal committee to rehear the appeal and give **fair and reasonable consideration** to those policies and provisions."

The term "fair and reasonable consideration" is emphasized to point out that the Board does not have the authority to direct that a decision be changed in a way that it considers to be consistent with its policy.

Subsection 24(12) of the Act provides that "the decision of the appeal committee resulting from a rehearing of an appeal pursuant to a direction under subsection 24(8) is final, unless a court determines under subsection 26(1) that the policy in question is consistent with the Act.

If at this stage, the Board members continue to believe the Appeal Tribunal has erred in its decision by not applying board policy - either the Appeal Tribunal or the Board may, pursuant to subsection 26(1) of the Act, apply to the Supreme Court for a determination of whether a policy established by the Board is consistent with the Act. If the Supreme Court decides the Board's interpretation of the policy is consistent with the Act then the Appeal Tribunal has the responsibility to reach a decision that is consistent with the Court's interpretation of the policy.

Subsection 25(11) provides for a worker, a dependent of a deceased worker, or an employer to make application for a judicial review of a decision of the Appeal Tribunal on the basis they believe there has been an error in law or jurisdiction.

Similar to all other Canadian WCBs, the Yukon legislation appears to provide sufficient appeal opportunity to challenge and correct any misapplication of law or policy and also to determine if a policy is consistent with or supported by the Act.

Options

1. No change to legislation
2. Amend the legislation to make it clear that in addition to the Appeal Tribunal, all board officers and employees are bound by policies of the Board.

Issue #4 Processes for dealing with new evidence (11)

Background and Discussion

What are the steps outlined in the Act?

Section 12 of the Act states that "A claim for compensation shall be dealt with and determined in **the first instance** on behalf of the board by an adjudicator employed by the board". (Emphasis added)

Subsection 20(1) of the Act provides that "On written request of a worker, a dependent of a deceased worker, or an employer, a hearing officer or panel of hearing officers shall review any decision made concerning a claim for compensation under section 12".

Subsection 20(3) (d) provides that the hearing officer shall consider further evidence considered necessary to make a decision; however, subsection 20(4) requires the determination to be made within the time frame prescribed by the regulations. The 30 day provision in regulation to complete the review places tight time frames in which to gather new evidence.

Subsection 25(1) provides the Appeal Tribunal with exclusive jurisdiction to examine, inquire into, hear, review and determine all matters arising from a decision of the board made under subsection 8(1), from the decision of a hearing officer under subsection 20(1), or from the decision of the president under subsection 27(4) of the Act.

Subsection 25(6) provides that " The Appeal tribunal may at any time examine, inquire into, **re-open, and re-hear** any matter that it has dealt with previously and may rescind or vary any decision or order previously made by it."

The wording of section 112 conveys authority to the board similar to that described in subsections 25(1) and 25(6) **however, the authority is subject to subsection 25(1).**
In other words – the board's authority is limited by the Appeal Tribunal's exclusive jurisdiction.

Re-opening and re-hearing claims

The Issue arises as a result of lack of clarity or definitions of the terms re-open and re-hear. This subject was dealt with at length by Alan Winter in the B.C. legislation and Policy Review in 2002.[38]

Re-hearing a matter previously dealt with is in reality "reconsidering a previous decision" and an application to rehear is one that questions the validity of a previous decision on a claim and which is requesting a change to that decision. Clearly the board officers are and should be prohibited from reconsidering a matter that has been dealt with by the Appeal Tribunal. If such broad authority is given to adjudicators then no matters could be considered to be *final* and as a result sets up conditions for a never ending process of decisions and appeals. This would also provide the potential for a significant unknown financial liability being placed on the present (and the future) workers compensation system.

Re-opening a claim due to a change in the worker's circumstances (such as a medical deterioration of the worker's compensable condition) since the time of the previous decision, should be treated as an application for adjudication of a new matter and not a reconsideration of a previous decision. It would be arbitrary, and contrary to medical science, to fix compensation entitlement as of one specified date, and not to recognize changes that may occur in the worker's medical condition or disability. If the original injury was previously determined to have been work-related, the worker should be entitled to receive consideration for further compensation benefits in the event that the compensable condition has deteriorated.

Legislative amendment or board policy should clarify that an application for reopening due to a deterioration of the worker's medical condition be considered as a new matter for adjudication. Then the application would fall under the term **"in the first instance"** of section 12 and be dealt with by a board adjudicator.

There is a third Issue discussed in the "Winter"[39] report with reference to advances in medical technology and knowledge that raise questions concerning the merits of claims which had previously been decided. It is suggested that a balance must be achieved between finality of previous decisions rendered by the WCB/Appeal Tribunal and the ability of a workers compensation system to respond to new circumstances. The mechanism needed to address these circumstances should not result in retroactive adjudication but be adjudicated to provide benefits from the date of application.

Winter called this a "**re-inquiry**" and set up the following principles with respect to how the re-inquiry process would work.

- An application for a re-inquiry could only be made by a party with respect to a "final" decision rendered by the WCB/Appeal Tribunal (i.e.: after all the available appellate steps have been completed or, in the case where an available level of appeal was not utilized, after the applicable time limit for commencing the appeal has elapsed)
- A prerequisite for having the WCB conduct a re-inquiry of a previous "final" decision would be the presentation by the applying party of new evidence which has a substantial and material impact on the previous decision. For instance this could include significant new evidence arising from medical advances which have occurred since the previous decision was rendered.
- The application for re-inquiry would be made to the initial decision making level of the WCB
- The initial decision maker would have to determine the following two Issues with respect to the application for re-inquiry.
    - **(a)** Has new evidence been presented which has a substantial and material impact on the previous decision?
    - **(b)** If the above question is answered in the affirmative, then the initial decision maker would have to consider the merits of the application for re-inquiry and decide whether the result of the previous decision be revisited based upon the new evidence presented.
- The initial decision makers determination, with respect to the above two Issues, would be subject to an appeal by an affected party to the Appeal Tribunal.
- If the previous "final" decision is revisited and ultimately changed as a result of an application for re-inquiry, the change would be effective only from the date the party's application for re-inquiry was submitted to the WCB. (no retroactive application)

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[39] http://www.labour.gov.bc.ca/labr_pub.htm

- Repetitive requests for a re-inquiry from the same party will constitute an abuse of process and the President may make such a determination and specify that the WCB will not accept further applications for re-inquiry from a specified party.

Options

1. No change to legislation.
2. Amend the legislation to be more specific on the Issue of who can reconsider, reopen or re-inquire and set out the terms and conditions for an application process for each.

Issue # 5 Mediation as an effective method for primary dispute resolution (12)

Background and Discussion
Appeal Tribunals should have a broad range of mechanisms to resolve appeals brought to it. These include pre-hearing conferences, pooling of like appeals and alternate dispute resolution (ADR).

Generally speaking, ADR would involve the use of mediation by the Appeal Tribunal to seek a consensual resolution amongst the parties of interest in the particular appeal. ADR is not an appropriate mechanism to use when the Issue under appeal concerns a question of entitlement to compensation benefits under the Act. Whether the worker's injury did actually arise out of or in the course of employment concerns the foundation of the worker's entitlement to benefits and therefore requires adjudication to resolve.

There are several points to consider when contemplating the use of ADR.

- The use of ADR/mediation must be consensual. If any party to the dispute objects to its use then ADR should not be utilized.
- ADR/mediation will be a non-binding process unless the parties agree to a consensual resolution. This means that if ADR/mediation does not resolve the Issue, then the Appeal Tribunal would have to adjudicate.
- Any persons at the Tribunal involved in ADR would require training specific to the use of ADR mechanisms.
- For ADR to be effective, it must include representatives from the WCB since any consensual agreement must be implemented by the WCB and should be acceptable to the WCB.

The use of ADR could be spelled out in legislation under the topic of Appeal Proceedings. An example is found in subsection 246 (2) (g) of the British Columbia Workers Compensation Act – "the appeal tribunal may – recommend to the parties to the appeal that an alternate dispute resolution process be used to assist in the resolution of a matter under appeal ".

In spite of having this ability in legislation for 3 years, the B.C. WCB reports that they have not used ADR in the claims appeal review process and the Appeal Tribunal has used ADR for three appeals. It was only successful on one occasion. They advise that it is considered too costly a gamble without certainty that the parties will not appeal if not satisfied with the mediation.

Members of the Appeal Tribunal would have to take training in the use of ADR/mediation mechanisms.

Options

1. No change to legislation.
2. Add a section to the legislation that provides that both the Appeal Tribunal and the Hearing Officers may recommend the use of ADR to parties to an appeal. Training would have to be provided to Appeal Tribunal members and Hearing Officers.

Issue # 6 Administration's standing at hearings (13)

Background and Discussion

No other Canadian jurisdiction provides the board with standing at Appeal Tribunal hearings. There have been occasions when the Appeal Panel in some jurisdictions has summoned board staff to provide evidence as witnesses however, they did not have standing. The board adjudicator's decision and the reviewing officer's decision are part of the claim file and if well written is the board's opportunity to provide clear information at an appeal hearing.

According to Blake, "Most statutes are silent as to whether the tribunal whose decision is under appeal has status on appeal. The courts frown upon attempts by a tribunal to present arguments in justification of its decision. It had its opportunity to justify and explain its decision in its reasons. By taking sides on appeal it gives an appearance of bias. Even where a tribunal is granted status on appeal from its decisions, its participation is limited to defending its authority to make the decision. It will not be permitted to argue the merits as between the parties, nor to defend any allegations that it failed to accord procedural fairness to the parties."[40]

Options

1. No Change to legislation.
2. Amend the legislation to provide the board with standing at Appeal Tribunal hearings.

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[40] Blake, S. (1992) Administrative Law in Canada, Butterworths Canada

Issue #7Jurisdiction of Appeal Tribunal (20)

Issue #8 Employer's appeal process (51)

Background and Discussion
These two topics are closely linked and discussed together.

The Appeal Tribunal hears appeals on claims Issues pursuant to subsections 8(2), 21(1) and 27(5) of the Act.

An Appeal Panel of the Board hears appeals pursuant to subsection 108(h) of the Act of assessment matters, determinations under subsection 55(5) and appeals under the Occupational Health and Safety Act.

There are different avenues for appeal for workers and employers. Workers who are not satisfied with claims adjudication have two levels of appeal. The first step is an internal review by a hearing officer which can be followed by an appeal to the independent external Appeal Tribunal. Employers, unlike workers, do not have access to an independent appeal body. Employers with concerns about assessment classification and rates or occupational health and safety matters have only one level of appeal and that is to the appeal panel of the Board which could be interpreted as an internal appeal level. Similarly any party with a concern about a third party action appeals to the Appeal Panel of the Board (Subsection 55(5)).

A worker's employer may appeal a decision made under section 20 to the Appeal Tribunal.

There is nothing in the legislation that allows employer participation, in an appeal of a decision made, by the board, where the workers' employer has ceased to exist even though the financial impact of the decision falls to an employer subclass. It may be appropriate for the Appeal Tribunal to have the ability to create a procedure for the conduct of its own affairs, that provides – where the employer of a worker appealing under section 20 has ceased to be an employer under the meaning of the Act, the Appeal Tribunal may deem an organized group of employers in the class/subclass to be the employer of the worker for the purpose of the appeal.

The Yukon is the only Canadian WCB that does not allow assessment appeals to an external body. Of the jurisdictions with OH&S responsibility, three (B.C., New Brunswick and Quebec) allow external appeals of OH&S matters.

Yukon employers express a concern that they cannot appeal assessment and OH&S matters to an external body. The Appeal Tribunal cautions that added cost may result from a change to allow these new matters to be appealed to the Tribunal and that training would be required to ensure the members have the knowledge to deal with these subjects.

There have been 4 OH&S appeals in the last two years and the number of assessment appeals average one per year although in some years there are none.

Should all claims matters and assessment matters be appealed to the Tribunal?
The legislation and policy review in British Columbia in 2002 recommended restricting the matters that can be appealed beyond the internal review level as a means of controlling the volume and the related significant cost for relatively minor compensation Issues and also for Issues that would dramatically affect the assessment rate group structure.

In B.C. the Issues precluded from external appeal are:

- Decisions rendered by the board concerning Rate Group or Industry Sector to which an industry is assigned for assessment purposes.
- Any vocational rehabilitation decisions concerning eligibility, nature and extent of vocational rehabilitation services provided to disabled workers or the dependents of deceased workers.
- Decisions applying the indicated percentage of permanent impairment of earnings capacity or of the impairment rating schedule for chronic pain.
- Decisions whether or not the WCB should commute a permanent impairment award.
- Decisions concerning the eligibility, nature and extent of allowances where the WCB has discretion such as – clothing allowances, personal care expenses, independence and home maintenance allowances, transportation allowances, subsistence allowances and/or homemaker's services

It does not appear that any other Canadian jurisdiction has restricted the matters that can be appealed to the external appeal tribunal.

Options

1. No change to the legislation.
2. Amend the legislation to provide that appeals for assessment matters and OH&S matters will be to the external Appeal Tribunal. Section 55(5) determinations should continue to be made by the appeal panel of the Board.
3. Amend the legislation to provide that appeals for assessment matters and OH&S matters will be to the external Appeal Tribunal. Section 55(5) determinations should continue to be made by the appeal panel of the Board. Amend the legislation to place restrictions on the matters that can be appealed to the external Appeal Tribunal similar to those used in B.C.

Issue # 9 Application to the Supreme Court (21)

Background and Discussion
The fundamental reason for establishing workers compensation systems was to minimize the involvement of the court system. As such the legislation of Canadian systems excludes the courts from any matters related to workers compensation with the exception of those related to law or jurisdiction. Canadian legislation also includes provisions declaring the finality of board decisions.

In the Yukon legislation there are two provisions where an application to the Supreme Court is permitted. Subsection 26(1) provides that the Appeal Tribunal or the Board can apply to the Supreme Court for a determination of whether a policy established by the Board is consistent with the Act. This subsection could be amended to allow the Appeal Tribunal or the Board to apply to the Supreme Court for a determination of whether a decision of the Tribunal is also consistent with the Act itself. Subsection 25(11) provides that workers, their dependents or an employer can apply for a judicial review of a decision of the Appeal Tribunal where they believe there has been an error in law or jurisdiction.

Except for four workers compensation jurisdictions (New Brunswick, Nova Scotia, Price Edward Island and NWT/Nunavut) employers and workers are precluded from the courts with the exception of a judicial review of an Appeal Tribunal decision. In these jurisdictions persons directly affected by Appeal Tribunal decisions may appeal them to the relevant Appeal Court.

No jurisdiction in Canada specifically provides for workers or employers to apply to the relevant Appeal Court to determine if a Board policy is consistent with the Act.

Options

1. No change to legislation.
2. Amend subsection 26(1) such that both the Appeal Tribunal and the Board can apply to the Supreme Court for a determination of whether a decision of the Appeal Tribunal is consistent with the Act. This would appear to be significant change for something that is likely a rarity. Such a change also has the Board and the Appeal Tribunal in dispute over an interpretation of the Act. The Board always has the option to create policy to clarify its interpretation and this would then be subject to the current provisions of 26(1) if in dispute.
3. Add legislation that provides for workers or employers to apply to the Supreme Court for a determination of whether a policy of the Board is consistent with the Act. There seems to be little need for such an amendment. The worker or employer can state a case on appeal to the Tribunal that the policy is not consistent with the legislation. The tribunal is the highest court available to workers and employers for such Issues.

Issue #10 Standing at assessment hearings (50)

Background and Discussion

The Issue is whether persons who may argue they are affected by a decision but not directly affected should have standing at an appeal hearing.

Terrance Ison [41] in his book argues that workers or their representatives may have interests in assessment appeals if they relate to administrative penalties for OH&S violations or where an employer is unable to pay assessments.

Since it is a collective liability system, the Issue of whether an employer is able to pay assessments or not doesn't affect a workers entitlement or payment of benefits. If the appeal panel feels they need a worker's evidence be presented at an administrative penalty hearing then they have the ability to request attendance as a witness.

Except for the worker and/or employer directly affected by the appeal, or their representative most jurisdictions in Canada exclude parties from standing at the external appeal body.
The board officers are excluded since the written record of their decision should stand as their evidence. When this written record lacks clarity, the appeal panel can require attendance of board officers to provide further explanation.

Other parties are excluded when they are not directly affected by the decision in order to enhance the timeliness and reduce the costs of appeals. Exclusion is important also to ensure there is not a breach of confidentiality and release of proprietary information. Nothing precludes the appeal panel from requesting attendance of other parties they deem necessary to fact finding in order to make their decision.

The Yukon Board has had on average only one assessment appeal per year and some years there are none. Given the infrequency of appeal hearings, amending the legislation to provide standing for those with a direct interest may overstate the need.

Options

1. No change to legislation
2. Amend the legislation to clarify those who can attend Appeal Tribunal and Board appeal panel hearings. The appellant and their representative and those with a "direct interest" in the outcome should be considered in the language.

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[41] Workers Compensation in Canada

Issue #11 Annual reporting of Worker's Advocate (8)

Background and Discussion

Subsection 13(6) requires the Workers' Advocate to within 90 days after the end of each calendar year, submit a report summarizing the Workers' Advocate's activities in the preceding year and accounting for expenditures in that year to Minister of Justice who shall make the report available to the board, organizations representing employers and workers and the public.

The legislation is very clear that an annual report shall be prepared and that all relevant parties and the public will have access to the report. What is unclear is whether the accountability measures, if any, in the report are adequate to the needs of the Minister and the stakeholders. With or without direction from the Minister, the Workers Advocate would consult with stakeholders to determine suitable performance measures for inclusion in the annual report.

The Minister of Justice could require the Worker's Advocate consult with the board, representatives of employers and workers on performance measures that would satisfy their interests and which were capable of being generated without excess cost to the Worker's Advocate.

Options

1. No change to legislation
2. Amend the legislation to direct the Workers' Advocate to consult with stakeholders to determine suitable performance measures for inclusion in the annual report.

Issue #12 Annual reporting of the of the Appeal Tribunal, Workers' Advocate and Employer Consultant (63)

Background and Discussion
Subsection 23(c) of the Act requires the Appeal Tribunal to report to the Minister, no later than 90 days after the end of the calendar year with respect to the number of appeals heard, resolved, and pending before the Tribunal, the activities of the Tribunal generally, and any other matters that the Minister requests. This section also provides the Minister with the ability to request the Chair of the Appeal Tribunal to include statistical information that measures the Tribunals efficiency and effectiveness satisfactory to the Minister. Further, nothing precludes the Minister from tabling the Appeal Tribunal Annual report with the Legislative Assembly.

The Workers' Advocate and the Employer Consultant could similarly be requested by the respective Minister to provide a service plan and statistical measures that demonstrated they were meeting the service plan objectives.

Four other Canadian jurisdictions (Newfoundland and Labrador, Nova Scotia, Quebec and Saskatchewan) require the appellate body prepare an annual report that is tabled in the legislature.

The Auditor General's report of special examination suggested the Minister may wish to create legislation requiring that the Appeal Tribunal's Annual Report be tabled with the Legislative Assembly within a specific time after it is received by the Minister and further that the Annual Report contain information that would measure the Tribunal's efficiency and effectiveness.

Options

1. No change to legislation
2. Amend the legislation to include that the Minister shall table the Tribunal's Annual Report with the Legislative Assembly within a specified time frame and also to require the report contain measures of efficiency and effectiveness of the Tribunals operations.

Issue #13 Board's notice to employers of a claim for compensation (6)

Background and Discussion
Part 2 of the Act is very clear in prescribing the duties of workers and employers when a workplace injury or work related disability occurs.

Subsection 9(1) of the Act requires the worker or if deceased their dependent to provide written notice to the employer describing the details of a work-related disability.

Subsection 10(1) of the Act requires the worker to notify the board in a form acceptable to the board of a claim for compensation and that has to be done within 12 months of the date of injury or the date the disability arose.

Subsection 11(1) of the Act requires the employer to give written notice of any, or the possibility of any, work-related disability that comes to their attention within three days of receiving the information.

Subsection 11(2) of the Act requires employers to provide the board, within a reasonable time, with any further information regarding the disability.

Subsection 11(3) of the Act lists the steps the board may take including a levy of a penalty to the employer if the employer fails to provide any notice of information within the time required by this section.

Subsection 14(1) of the Act requires a medical practitioner who attends a worker who has or may have suffered a workplace related disability to report the disability to the board.

The Yukon legislation is consistent with that of all other Canadian jurisdictions.
Clearly the onus is primarily placed on workers and employers to notify the board of any workplace disability that occurs or could arise.
The experience in most jurisdictions is that most employers fail to meet the three day deadline for reporting. Several jurisdictions are aggressive in fining employers who consistently fail to report in a timely manner. Where fines are levied it is usually when the employer is suppressing the reporting of claims to reduce their experience rating for assessment purposes.

The experience in all jurisdictions is that the first report of injury or disability is most often (about 80% of the time) the doctor's medical report of injury or disability. The board then writes to the employer and the worker asking for the report of injury which they are required by legislation to submit. Most boards also advise employers in the letter that if they fail to submit the information by the date required in the letter that they will adjudicate the claim with the information they have available in order that the board can adjudicate in a timely manner and meet a "pay continuity" standard for those workers entitled to compensation.

Employers are or should be fully aware of workers who have suffered a workplace injury. Where the disability is a strain, sprain, repetitive motion injury or exposure to a hazard that results in a disease, the worker may not be losing time and may not have connected the injury or disease to the workplace prior to visiting their medical practitioner. The worker may also not be aware of the requirement to notify their employer. This results in the employer at times surprised when they receive notice from the board of the injury/disease. Large workplaces are most susceptible to experiencing this problem.

The key to resolving this problem is communication between the employer and their employees. The board could utilize other forms of communication, such as email, fax, direct contact, etc., to notify the parties. Employers should make their employees aware of the requirement to report any workplace injury or suspicion of a work-related injury or disease to the employer and to the board.

Options

1. No change to the legislation.
2. Amend the legislation to include a requirement that the board, upon receipt of any of the three documents, notify the other two parties of their responsibilities.

Issue #14 Processes for release of claims information (14)

Issue #15 Access to claim file – (documents in respect of their claim) (15)

Background and Discussion
These two Issues are closely linked and are discussed together. The pertinent sections of the Act are:
Subsection 24(4) The board shall provide the appeal committee with the worker's record and all relevant policies and the committee shall consider that information and any other evidence or information it considers relevant in rendering its decision.

Section 27(1) A worker, or the dependent of a deceased worker, may, at the offices of the board, examine and copy all information in the possession of the board in respect of their claim but shall not use the information otherwise than for the purpose of procedures before the board or the appeal tribunal unless permitted by the board.

(2) An employer who is a party to a review under section 20 or an appeal under section 21 may, on request to the board, examine and copy any information in the boards possession that the board considers relevant to an Issue at the review or the appeal but shall not use the information for any purpose other than for a review under section 20 or an appeal under section 21.

(3) If an employer has made a request under subsection (2) the board shall immediately notify the worker or the dependants of a deceased worker of the information the board considers relevant and permit written objections to be made within a period of time determined by the board and release the information that has not been objected to by the worker.

(4) If an objection has been made under subsection (3), the information objected to shall be provided to the president of the board, or the acting president, for final determination of whether the information should be provided to the employer.

(5) No appeal lies against a decision made under subsection (4). The decision is final except when the appeal committee, during the hearing of the appeal, determines the information to be relevant to an Issue under appeal, in which case the employer shall be provided with the information.

(6) If a worker or a dependant of a deceased worker, or an employer is entitled to information under this section, their agent shall have the same access.

(7) The board may set a fee for providing copies of documents under this section.

(8) Any person who contravenes subsections (1) or (2) commits an offence under this Act.

The Yukon legislation provides different access to claim file information depending on whether the request for access is from the worker or the worker's employer.

An examination of the access rules in the other jurisdictions in Canada shows that they vary considerably. Most boards only provide access and if the worker, employer or their representative wants to have copies they are provided and there may be a charge for copying. The B.C. legislation directs the board to provide copies when requested.

In British Columbia when application is made for a review or appeal, the board must provide copies of the claim file to the worker and if required to the employer. There are no restrictions on release and no requirement to notify the worker of an employer's request. The Workers and Employers Advisors have unrestricted access to the files at any time. Because B.C. uses an

electronic claim file, the Advisors have online access to the files and employer or worker information can be provided in a printed version or on a compact disk (CD).
Ontario, Saskatchewan and Nova Scotia all have provisions similar to those in the Yukon legislation, however Ontario and Saskatchewan will also withhold medical information from the worker that the board officer deems may be detrimental to the worker. This medical information is sent to the worker's physician and the worker may get an explanation from the physician.

Alberta and the NWT/Nunavut will provide access to the relevant information to those persons directly concerned with the appeal.

Disclosure of only the appropriate and relevant information is dependent on whether an organization has a good records classification and management system. An effective system will preclude the placement of medical information on the worker's file that is unrelated to the workers injury or disease that may be sent to the board by the workers physician. It will also ensure that records stored on other media such as video and voice records are cross referenced on the paper or electronic file.

A common Issue is that information related to one worker is inadvertently placed in the file of another worker and is inappropriately disclosed when the organization merely copies the contents of the file. When the volume of requests for access and disclosure is high, the organization must make a trade off between disclosing in a timely manner and ensuring that the information disclosed is relevant and complete. Without sufficient resources there will either be serious delays or errors in the process.

One might question whether the employer access to the claims information, as prescribed in the Yukon legislation, is really necessary since it sets up a convoluted process that can involve many steps, consumes staff and Appeal Tribunal time and creates delay.

In the worst case scenario:

- the employer requests access to the claim file,
- the worker is notified of the request and objects to the employer having access,
- the President reviews the material and agrees with the objection,
- the appeal committee during the appeal considers that the release to the employer is relevant to the Issue and discloses to the employer,
- the employer may need time to review and consider the file and there is further delay.

It may be worth examining the number of times that an objection by a worker occurs in a year related to the number of disclosures and if it is an infrequent event, amend the legislation to remove subsection 27(3), (4) and (5).

Options

1. No change to legislation
2. Amend the legislation to remove subsections 27(3), (4) and (5) and provide full access at reasonable times to the employer.

Additional Consideration
Amend the legislation to add a subsection that provides that the board may withhold medical information from disclosure to the worker, his dependents or the worker's employer if the board believes the disclosure would be detrimental to the workers well being. Disclosure could be to the worker's physician who could explain the medical Issues to the worker.

Issue #16 Implementation of Appeal Tribunal decision – timeframe for (16)

Background and Discussion

The Act prescribes the following implementation provisions.
28 Subject to an appeal under subsection 21(1) and subject to subsections 24(8), (10), and (13), the board shall
(a) implement any decision of a hearing officer or appeal tribunal; or
(b) provide the hearing officer or the appeal tribunal, the worker, the dependants of a deceased worker, and the worker's employer with an implementation plan for the decision of the hearing officer or appeal committee within 30 days after the date of the decision of the hearing officer or appeal tribunal.

While the Boards of Directors in most jurisdictions are required to ensure that Appeal Tribunal decisions are in keeping with the Act and Policies it is usually the administration that vets the decision and ensures compliance. Review of every appeal decision by the Board of Directors would very difficult in larger jurisdictions. This usually results in a very limited number of Issues being brought to the Board of Directors.

The only other jurisdiction with time requirements for implementation of appeal decisions in their legislation is Alberta where the requirement defaults to 30 days if the decision is not timely. The British Columbia Board's policy requires that the decision be implemented or an implementation plan be completed within 30 days of the review or appeal decision.

Where the decision requires that a worker's wage loss benefits are to be re-instated, the board should be able to meet a 30 day time frame. The worker has likely been without wage loss benefits for many months, any further delay is a travesty. If in addition, the decision requires retroactive wage loss benefits to be paid, the worker should be advised when they could expect payment. If the decision requires a vocational rehabilitation plan to be developed for the worker, then wage loss benefits should restart within 30 days and the vocational rehabilitation plan provided as soon as practicable.

At the outset of the review the Board indicated that the legislated 30 calendar days were extremely difficult to achieve.

Options

1. No change to legislation
2. Amend the legislation to alter (longer or shorter) the existing timeframes.
3. Amend the legislation to remove the existing timeframes.
4. Amend the legislation such that the Appeal Tribunal shall prescribe as part of its decision the implementation time constraints.

Issue #17 Term "adjudicator" in legislation (17)

Background and Discussion
The sections of the legislation containing the term adjudicator or hearing officer are:

Section 12 A claim for compensation shall be dealt with and determined in the first instance on behalf of the board by an adjudicator employed by the board.
Subsection 16 (7) A worker who has made a claim for compensation or, in the case of a deceased worker, the dependant of a deceased worker who claims compensation who has represented to the board that
(a) the worker suffers or suffered a greater functional impairment than that decided by an adjudicator or hearing officer;
(b) the worker suffers or suffered a greater limitation in working capacity than that decided by an adjudicator or hearing officer; or
(c) the decision of the adjudicator or hearing officer was based on a medical practitioner's report that was erroneous or incomplete, may, in writing, request the appeal committee to order an independent medical examination be undertaken or independent medical opinion be provided in accordance with subsections (2) and (3).
20(1) On the written request of a worker, a dependant of a deceased worker, or an employer, a hearing officer or a panel of hearing officers shall review any decision made concerning a claim for compensation under section 12.
31 If compensation is payable, the adjudicator, hearing officer or appeal tribunal shall order that interest be paid on that compensation in accordance with board policy and the board shall pay that interest.
32 Subject to paragraph 23(b), the decisions, orders, and rulings of an adjudicator, hearing officer or the appeal tribunal shall always be based on the merits and justice of the case and in accordance with the Act, the regulations, and the policies of the board.
114(1) An adjudicator, a hearing officer, an appeal panel, or the appeal tribunal shall provide written reasons for any order, ruling, or decision that it has made, with the exception of those orders, rulings, or decisions related to procedural matters.

With the exception of Alberta, all other jurisdictions in Canada do not refer to the decision maker's title. They simply state that decisions are decisions of the board.

The YWCHSB has changed the titles of decision makers over the years to disability case managers, auxiliary adjudicator, senior adjudicator and benefit entitlement clerk. This Issue could also include other decision makers such as contractors, financial officers and senior management of the board. An inconsistency exists between the wording of the sections of the Act listed above and the operational tiles of decision makers at the board.

Options

1. No change to legislation.
2. Amend the listed sections of the Act to substitute the term "board officer" for the term "adjudicator".

Issue #18 Choice of gender of medical consultant (18)

Background and Discussion
The Yukon's Act is currently silent on this Issue.

At times, workers may be required to undergo a medical examination by the Board's medical consultant. Some workers have expressed discomfort with the lack of gender choice of the Board's medical consultant.

British Columbia, Ontario and to some extent Manitoba and Alberta legislation allow for the worker to choose their physician for the administration of health care. There are varying degrees of flexibility in the choice.

Ontario, British Columbia and Saskatchewan use rosters of physicians acceptable to the board from which a worker and the employer are allowed to choose a representative for a medical review panel.

In the Yukon, the board may appoint one or more medical consultants to provide advice to the board. On appeal, the appeal panel is required to consult with the worker and the workers medical practitioner before appointing a panel of or an independent medical practitioner to advise the appeal panel.

The remote nature of the Yukon and the limited availability of local physicians are impediments to providing choice of physician and their gender. Board policy should state that wherever practicable the worker shall be able to choose the physician.

Options

1. No change to legislation.
2. Amend the legislation to provide workers with a choice of the gender of the Board's medical consultants when consultants of both genders are locally available.
3. Amend the legislation to provide workers with a choice of the gender of the Board's medical consultants.

Issue #19 Board's ability to seek clarification of Appeal Tribunal decisions (19)

Background and Discussion
The only ability for the board to refer Appeal Tribunal decisions back to the Tribunal is found under subsection 24(8) If the members of the board consider that an appeal panel has not properly applied this Act or a policy of the board it may stay the decision and direct a new hearing before a new panel.

There may be occasions where the board finds the Appeal Tribunal panel's decision lacks the clarity it needs to properly implement the decision. The dilemma is that Appeal Tribunal decisions are final and binding and the panel itself is *Functus Officio* i.e. its authority over the Issue is completed and cannot be revisited. Although in general in all jurisdictions Appeal Tribunals generally loath to discuss an appeal decision with a board officer, the over-riding Issue is that the Appeal Tribunal is a component part of the overall system and should be able to collaborate to ensure its smooth and effective operation.

Some Appeal Tribunals have quality standards for good decision writing and a vetting process by other appeal members to ensure the standard is met. Where this process is followed the need to seek clarification does not occur.

Where a decision is unclear and subject to various interpretations, its implementation if the worker disagrees can result in another appeal to seek clarity. This frustrates the worker and brings discredit to the overall system.

In some jurisdictions, the Chair of the Tribunal and the board President create an informal arrangement where the President may call the Appeal Tribunal Chair and ask if clarification can be made for implementation purposes.
Alberta is the only jurisdiction where legislation provides that an affected person or the Board may seek clarification of directions given in respect of a decision.

Options

1. No change to legislation.
2. Amend the legislation to provide that the Board may seek clarification from the Appeal Tribunal of directions given in respect of a decision and that the time frame for implementation is suspended until the clarification has been obtained.

Issue #20 Return to work and employer's obligation to re-employ (22)

Background and Discussion
There are two questions related to this Issue. Should there be a statutorily mandated duty upon employers to accommodate injured workers? And If so, should the nature of the duty vary depending upon the size of the employer and/or industry?

This Issue was considered at length by the B. C. Royal Commission on Workers Compensation in 1998.[42]

The B.C. Commission believed that prolonged absences from work due to injury or illness place the injured worker at a significant disadvantage in returning to work and that while vocational rehabilitation efforts on the part of the board are essential, they would be enhanced by measures directing the workplace parties, whenever possible, to sustain the injured worker's employment with the time of injury employer.

For those workers who suffer permanent disability as a result of a work-related injury or disease, a statutory re-employment provision reinforces the hierarchy of vocational rehabilitation objectives, which ranks return to the time of injury job or another job with the time of injury employer as the optimal return to work goal.

The B.C. Commission also believed that there should be an accompanying duty to reasonably accommodate workers to enable them to perform the functions of the job, so long as providing the necessary accommodation does not impose undue hardship on the employer.

Although they believed that it should primarily be the employer's obligation to re-employ an injured worker, they also believed that it is a multi-party obligation that requires the co-operation of the injured worker and the co-workers.

The B.C. Commission recommended the Act be changed to require employers with 20 or more workers to re-employ injured workers for a period of up to two years following the date of injury, if the worker has at least one year of tenure with the employer. The board would assess and adjudicate where the accommodation imposes undue hardship on the employer or other workers.

The British Columbian Government chose not to amend the legislation to introduce these provisions.

Alan Winter revisited this Issue in the B.C. Legislative and Policy review of 2002.[43]

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[42] http://www.labour.gov.bc.ca/labr_pub.htm
[43] http://www.labour.gov.bc.ca/labr_pub.htm

Winter was reluctant to agree that mandatory re-employment of a disabled employee, the employer's duty to accommodate, and the standard of undue hardship be placed in the legislation because it would duplicate the requirements of the *Canadian Charter of Rights and Freedoms* and the *Human Rights Code*.
The restrictions placed in legislation would provide conflicts.
Placing the obligation to accommodate on an employer dependent on the size of the employers workforce (a common provision found in the legislation of other jurisdictions) is at odds with human rights legislation since there is no size restriction. Each particular case is considered based upon its own circumstances in order to determine if the employer met its obligations pursuant to the human rights legislation and jurisprudence.

For example, if the threshold is set at 20 workers or more for the duty to apply to an employer. We have two employers and each have a worker that suffers the same debilitating injury. One employer has 21 workers and the other has 19 workers. Both employers argue it would be an undue hardship to accommodate their disabled worker.

If the duty is placed in workers compensation legislation the undue hardship is adjudicated by the board for the employer with 21 workers and the undue hard ship of the other employer would have to be adjudicated under human rights legislation.

A similar Issue arises where the mandatory re-employment would only be applicable to a disabled worker who had at least one year of tenure with the employer prior to the injury. For a disabled worker who has just more than one year tenure, the undue hardship adjudication is done by the board whereas the disabled worker with just less than one year tenure with the employer the undue hardship would be adjudicated under human rights legislation.

One argument for placing the duty within workers compensation legislation is a belief that the WCB is the agency best placed to address the concept of mandatory re-employment, insofar as it applies to an employer's duty to accommodate a disabled worker, up to the standard of undue hardship, for return to work purposes.[44]

The timeliness and effectiveness of a worker having to initiate a complaint under human rights in order to address the refusal to accommodate is a concern.

Winter recommended against adding the duty to accommodate to the legislation. The Government has not added such a provision.

It should be noted that the cost to employers is at least the same and likely greater than a system that has mandatory return-to-work legislation. This is because of the substantial added administrative and vocational rehabilitation expenditures. However, the distribution of cost is somewhat different. Employers in the same class or subclass will collectively share the cost where there is no duty to accommodate whereas those employers captured by a duty to accommodate will bear a larger share of the cost. Large employers that dominate a class or subclass are going to be paying the greater proportion of the costs in any event and they likely have an aggressive disability management program that develops modified and early return to work plans for injured and ill workers to mitigate cost.

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[44] http://laws.justice.gc.ca/en/charter/

Legislation in other jurisdictions

Four jurisdictions other than the Yukon (Alberta, British Columbia, NWT/Nunavut, and Saskatchewan) do not include mandatory re-employment in their legislation.

Manitoba introduced legislation in April 2005 obliging employers to re-employ injured workers.[45] Six other jurisdictions have mandatory re-employment legislation however; the thresholds for it to apply vary.

Newfoundland and Labrador, Ontario, and Nova Scotia exempt employers with less than 20 workers. New Brunswick exempts employers with less than 10 workers.

Five jurisdictions require that the worker to have been employed by the accident employer for at least one year for the duty to re-employ to apply.

Nova Scotia and Prince Edward Island exempt the construction industry, unless it is included by board regulation.

Conditions on re-employment

Other caveats found in some legislation include a requirement to reinstate the worker without loss of seniority or benefits.

In four jurisdictions (Newfoundland and Labrador, Nova Scotia, Prince Edward Island and Ontario) the employer's duty to re-employ expires after two years from the date of injury, and one year after the worker is medically able to perform essential duties of pre-injury employment or when the worker reaches 65 years of age. New Brunswick's duty to re-employ lasts for one year for employers with between 10 and 19 workers and for two years where the employer has more than 20 workers.

All jurisdictions require the employer to maintain the employment of the injured worker for at least one year. Where the employer fails to live up to the obligation the penalty is the greater of the compensation paid to the worker for one year and the board's costs or the worker's pre-injury average earnings for the year prior to the injury.
When a disabled worker refuses a suitable job the re-employment obligation ceases.

In summary the seven Provincial workers compensation jurisdictions east of Saskatchewan include a mandatory duty on employers to re-employ workers injured at their workplaces. The five jurisdictions to the west (including NWT/Nunavut) do not have the mandatory duty to re-employ.

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[45] http://web2.gov.mb.ca/bills/sess/b025e.php

Statistics Canada survey of persons with disabilities in Canada.
In 2001, there were 3.6 million Canadians with disabilities, according to the Participation and Activity Limitation Survey (PALS). This represents 12.4% of the population. Many Canadians with disabilities have high levels of education, are fully employed and have adequate incomes. Yet, research from a 2002 Human Resource Development Canada (HRDC) report—*Advancing the Inclusion of Persons with Disabilities, A Government of Canada Report*—shows that persons with disabilities face significant obstacles in all three of these areas.

For 2001 PALS reported that 37% of those aged 15 to 64 with disabilities had less than a high school education, while only 11% had completed a university degree. In contrast, over 25% of persons without disabilities had not completed high school, and 20% had completed university.

It was reported that among persons with disabilities, the employment rate was 45% for men and 39% for women. In contrast, among people without disabilities, the employment rate was much higher—about 79% for men and 69% for women. In 2000, working-age Canadians with disabilities took in 72% of the average income of those without disabilities.

In summary, persons with disabilities have about ½ the employment rate and about 2/3 the income level of those without disability.

Options

1. No change to the legislation.
2. Add legislation that has the following principles:

- employers with more than 20 employees are required to re-employ injured workers, if the worker has at least one year of tenure with the employer.
- employers are relieved of this duty if: they are a construction industry; or, regularly employ workers on a seasonal basis; or, more than two years have elapsed since the injury; or, more than one year has elapsed since the worker was deemed medically fit to return to work; or, the employer can demonstrate to the board's satisfaction that the injured worker's re-employment would cause undue hardship; or, if the worker refuses to accept the position offered by the employer.
- the employer must employ the worker for a least one year.
- an injured worker who meets the bona fide occupational requirements of the time-of-injury position is entitled to be re-employed in that position, or one comparable to it.
- a worker, who suffers a residual impairment due to the work injury that prevents the worker from returning to the time-of injury position, but who meets the occupational requirements of another available position with the time-of-injury employer, is entitled to first consideration to be hired to that position.
- in all cases where an injured worker is returning to the pre-injury employer, the employer and other workers are obligated to accommodate the worker so the worker can perform the duties of the time -of -injury position or a suitable alternate position.
- factors defining undue hardship shall be included in Board policy
- the employer's penalty for failing to accommodate the worker shall be the greater of the cost of compensating the worker for one year plus the board's costs or the worker's average earnings for the year prior to the date of injury.

3. Add legislation that has the same principles outlined in 2 except the worker must have at least two years tenure with the employer and the provision only applies to employers with more than 50 employees.

Issue #21 Uses of "deeming" (31)

Background and Discussion
The pertinent sections of the legislation are listed below.
36(1) If a worker is entitled to compensation, the board shall pay compensation to the worker in an amount equal to 75 per cent of the worker's weekly loss of earnings from all employment.
2) The method and manner of making a payment under subsection (1) will be determined by the board.

37 A worker's weekly loss of earnings is equal to the difference, if any, between the
(a) worker's average weekly earnings, up to the maximum wage rate for a week, immediately before the work-related
disability arose; and
(b) estimated average weekly earnings that the worker could, in the board's opinion,
earn from time to time, in a suitable occupation after the disability arose.

44 If a worker, as a result of a work-related disability, requires assistance to reduce or remove the effect of a handicap, or experiences a long term disability or requires assistance in the activities of daily living, the board shall pay the cost of rehabilitation assistance, including vocational or academic training, considered appropriate by the board in consultation with the worker.

The two main objectives in workers compensation systems are firstly, to provide compensation and medical benefits to entitled workers and secondly, to take the measures necessary and make the expenditures (the board considers necessary or expedient) to aid in getting the injured workers back to work or to assist in lessening or removing a resulting hardship.

Deeming occurs throughout the claim process. The day a worker is injured the board utilizes the process laid out in Section 37 (a) and (b) often immediately after the injury (b) is estimated to be $0 based on the workers medical condition and therefore is entitled to 75% of his pre-accident earnings (a).

As the worker recovers most times they return their pre-accident work therefore their post accident earnings (b) equal their pre-accident earnings (a) and there is no loss of earnings.

However, in other circumstances where the worker can no longer return to their pre-accident employment because of their disability they may require vocational rehabilitation from the board. At this point the board is charged with rehabilitating the worker to overcome the effects of the workplace injury. Rehabilitation is utilized to provide a better quality of life and allow the injured worker to return to a suitable occupation. Sometimes workers require any of or a combination of; job search, training on the job, retraining schooling etc. to assist them back into the workforce. Upon completion of those services the board must determine if the estimated or actual post accident earnings (b) equal their pre-accident earnings (a) and if there is a loss of earnings the worker will receive the difference (a) – (b).

In order to address "estimating earrings" after completion of vocational rehabilitation, at a Royal Commission in the 1950's in Ontario workers argued that "estimating" earnings capacity should be based on securing and maintaining a real job, while the employers argued that a worker could greatly influence his employability based on their own presentation. Therefore, Justice Weiler determined "deeming" to have a job when the worker didn't actually have one was acceptable in

3 situations 1) the worker chose not to return to the workforce 2) the worker was intentionally keeping himself from employment and 3) worker was intentionally under employing themselves. In those circumstances the board would "deem" the worker to have achieved a job that was suitable and reasonably available.

The legislation and use of deeming is common in all workers compensation jurisdictions. Whenever the Issue of "deeming" arises it is generally agreed that any workers compensation system must have some form of deeming in order to determine the loss of earnings capacity. The concerns usually are the frequency of use of deeming and the equity of the process.

The Case Manager has a difficult job estimating the permanent loss of earnings for a claimant who has not returned to work but has reached maximum medical improvement and had the appropriate vocational rehabilitation services provided.

Vocational Rehabilitation

There is no statutory direction provided in section 44 with regard to the guiding principles which the WCHSB must follow in exercising its discretion. Of the utmost importance therefore, is the Board's policy on the provision of vocational rehabilitation services to workers.

WCHSB policies CS-02, 03, 08, and CS-11 outline the Board's commitments for employment assistance, relocation assistance, deeming and the primary objectives and phases of vocational rehabilitation and return to work. The guiding principles of quality vocational rehabilitation and the primary vocational rehabilitation service objectives are similar to those found in all jurisdictions in Canada.

As is common in all jurisdictions the board has broad discretion with respect to the provision of vocational rehabilitation services. There are four areas where this discretion is required:

- What vocational rehabilitation services should be provided?
- Who should be eligible to receive any vocational rehabilitation services?
- Which of the services provided should any individual worker receive?
- What is the extent of vocational rehabilitation services to be provided to the eligible worker in terms of cost and/or duration of the services provided?

The goal of vocational rehabilitation services is to bring the worker to a state of "employability" however it is not a commitment to employment. The final deeming process should not be used until the worker has completed the first four phases of the vocational rehabilitation process.

Hunt and Leahy in their 1997 final report on Vocational Rehabilitation for the British Columbia board made a final comment on deeming.

> "In sum, deeming is inaccurate, impersonal, and overly demanding of professional judgment from the VR consultant. It is highly dependent on subjective interpretations of suitability and availability of employment and the capability of the injured worker. However, it also makes the entitlement system feasible and much like workers' compensation as a whole constitutes a system of administrative justice that is somewhat imprecise, but reasonably effective and economical."

All jurisdictions have recognized that the board requires a great deal of discretion in the area of vocational rehabilitation services and that there is a need to be able to bring their involvement with an injured worker to a conclusion. The deeming process is a necessary, although imprecise feature of the system which also requires broad discretion because similar to vocational rehabilitation it is tailored to the individual workers needs.

Options

1. No change to legislation.
2. Amend legislation to include method and manner in which "deeming" would be applied.

Issue #22 Reimbursement of compensation payments to employers and other insurers (32)

Background and Discussion

The sections of the Act dealing with this Issue are:
36(1) If a worker is entitled to compensation, the board shall pay compensation to the worker in an amount equal to 75 per cent of the worker's weekly loss of earnings from all employment.
39 If a worker receives earnings in respect of a period of disability, the board may pay to the worker's employer an amount equal to the compensation to which the worker would otherwise have been entitled.

Subsection 36(1) requires the board to pay compensation to the entitled worker. When an employer provides pay continuity to an injured worker the board may pursuant to Section 39 pay an amount to the employer. The discretion of this section falls to the board with the use of the word "may". The board is not obliged to reimburse the employer up to the amount the worker is entitled to in compensation benefits.

Section 39 is a common provision found in legislation in other jurisdictions and is valued since pay continuity is important to the worker and the maintenance of a connection to the employer is important in achieving a return to work as soon as the worker is able.

In British Columbia 20% of the claims volume is processed in this manner and is known there as the "payee II" system. The employers who utilize this approach in B.C. are mostly public sector employers such as health care, education and municipal, the Provincial and Federal Governments although some large private sector firms also use this practice.

In Quebec the workers compensation act requires employers to continue to pay workers for the first two weeks on claim and also some medical expenses which are reimbursed by the board when the adjudication is completed. Manitoba introduced a legislative amendment in April 2005 that provides employers with the option of paying the worker for the first two weeks and be reimbursed on adjudication.

In Australia some workers compensation systems require the employer to pay the first two weeks of wage loss and up to $400.00 in medical costs and the employer is not reimbursed by the system. The jurisdictions experienced a 60% reduction in claims volumes as a result of introducing this legislated requirement.

Analysis of claims duration in other jurisdictions shows that about 50% of the claims will open and close within a two week period. The use of this "payee II" system reduces the pressure on administrative staff in meeting the operation's pay continuity service objectives.

One of the concerns with employer pay claims is the suppression of claims being registered on the system. Some employers will absorb the costs related to a short term injury to avoid the experience rating penalty of the assessment system related to excess claims cost. Some employers will require the worker to file a claim against their sickness and accident insurance policy for the same reasons.

A second concern is that some employers will have a financial gain by continuing to pay the worker based on their regular scheduled hours even though the worker's history has been to regularly work overtime and it is on the basis of the pre-injury earnings that the board reimburses the employer.

In British Columbia a significant Issue arose in the Health Care Sector where workers had regular schedules of between 28 and 35 hours per week, yet the workers routinely worked 40 hours. An investigation of one employer using the Payee II system found that some workers were being underpaid by as much as $1000.00 per month.

The B.C board solved the Issue by advising the employers that they would be sending a copy of the payment made to the employer to the worker so that the worker could compare the amount they received from the employer to that the employer received from the board. The board then informed the employers that the board's legislated fiduciary duty is to the worker and warned them that if the under compensation continued, the board would send the compensation directly to the worker.

Payments made to an injured worker by other government agencies and insurers.
The B.C. legislation and Board policy provide an example of how they deal with 3rd party reimbursements

Section 15 of the B.C. Workers Compensation Act provides that "A sum payable as compensation or by way of commutation of a periodic payment in respect of it is not capable of being assigned, charged or attached, nor must it pass by operation of law except to a personal representative, and a claim must not be set off against it, **except for** money advanced by way of financial or other social welfare assistance owing to the Province or to a municipality, or for money owing to the accident fund."

Board Policy #48.20 Money Owing in Respect of Benefits Paid by Other Agencies
Workers frequently receive benefits from other governmental or nongovernmental agencies while awaiting the adjudication or a review or appeal of their compensation claim. If they eventually receive compensation benefits for the same period, the agency may have a claim against them for reimbursement of the funds advanced by it, but can only claim reimbursement from the Board if it is a Provincial Government agency or a municipality. In the case of health and welfare plans or similar insurance plans, while the *Act* in section 15 does not permit direct refunds to such agencies, the Board may, on receipt of a worker's signed authorization, mail cheques payable to the worker in care of the agency. In those cases where an inquiry is received from an insurance company or other health and welfare plan, the Board officer may provide the requested information as long as a signed consent from the worker is on file identifying both the Workers' Compensation Board and the insurance company.

Options

1. No change to legislation.
2. Amend the legislation to require the board to provide to the worker details of the amount paid to the employer on their behalf.
3. Amend the legislation to include wording similar to that used in Section 15 of the B.C. Act to provide for reimbursement of other government agencies providing social assistance. Board policy would be required to elaborate on how payments would be made to the agencies. Board policy and practice should also deal with those cases where employer pay arrangements are inequitable to the worker.

Issue #23 Claims management (36)

Background and Discussion

Over the last 10 to 15 years workers compensation systems in Canada have moved away from adjudication to a Case Management model for claims that extend beyond a time period set by the board.

Normally Case Management is applied when a claim reaches a range of 6 to 8 weeks post injury. Case Management is a process that utilizes all the relevant skill sets available at the board and as well, includes the worker, employer and the workers medical practitioner to establish a plan, agreed by all participants, to achieve the best possible outcome for the injured worker. The case management team at the board usually involves the claim manager, vocational rehabilitation consultant, a nurse advisor or the board's medical advisor and a psychologist or psychiatrist.

The objective is to look at the medical, psychological and social barriers that may be preventing a worker, whose workplace injury has or should have healed by this time, from returning to work.

The involvement of the employer and the worker in the process may result in an agreed workplace accommodation that facilitates a modified or progressive return to work plan. The involvement of the full range of skilled board staff or consultants allows for the development of a plan to re-skill/re-train that is appropriate to the worker and at the earliest possible stage in the workers recovery. The team may identify other unrelated medical/psychological or social Issues that have to be dealt with before a return to work or retraining plan can be successful.

Almost all workers compensation legislation in Canada is not prescriptive but provides the Board with very broad discretion in the management of claims and the services the board can provide. The medical/psychological and social factors are individual to each injured worker and this limits the ability to provide prescription in legislation.

Options

1. No change to legislation
2. Amend the legislation to add the key elements of Case Management found in WCHSB Policy CS-11. This approach would eliminate some of the flexibility and discretion required for complex claims. It would also preclude the Board from amending the model as knowledge in this area evolves.

Issue #24 Definition of initial treatment site (38)

Background and Discussion

Currently, transportation from the initial treatment site to hospital, medical practitioner, home or other place that may be required by the worker's condition is done at the employer's expense. There arises concern with regard to where the initial treatment site is and at what point does transportation become the board's responsibility.

From a Yukon perspective, this often is not a concern in Whitehorse as an injured worker can be transported to the hospital for a nominal cost of taxi fare or short ambulance ride. However, in communities or those employers that conduct business in remote areas of the Yukon the costs could soar.

This also places a burden of responsibility onto the employer as to which method of transportation will be used the get the worker to medical aid; costs which could vary from a ride on the back of a horse to a medical evacuation by helicopter.

The pertinent section of the Yukon Workers Compensation Act is as follows:
45(1) If a worker suffers a work-related disability, the worker's employer shall immediately provide and pay for emergency transportation for the worker to a hospital, medical practitioner, home, or other place that may be required by the worker's condition.
(2) If an employer fails to provide emergency transportation in accordance with subsection (1), and another person or the board incurs expense in doing so, the board shall reimburse the person and shall recover the amount from the employer as a debt due from the employer, the enforcement of which shall be done in the same manner as the enforcement of the payment of an assessment.

Section 15 of the Yukon Occupational Health and Safety Regulation provides the following authority to the first-aid attendant required by the Act.
3) The first-aid attendant shall be in charge of all first-aid treatment of injured workers until medical aid is available.
(4) Decisions of first-aid attendants relating to first-aid and the need for medical attention shall not be over-ruled by supervisory personnel.

With the exception of Manitoba, who amended their legislation in April 2005 to provide that the WCB pays for emergency transportation the legislation in all Canadian jurisdictions is consistent with that of the Yukon's Act.
The current legislation clearly states the employer's responsibility for the cost of transporting an injured worker.

Options

1. No change to the legislation.
2. Amend the legislation such that the board provides for the cost of transportation of injured workers. This would mean that the costs associated with transportation would be shared by all the employers in a class/subclass or alternatively shared by all employers. Employers operating outside of Canada shall be responsible for all emergency transportation and all medical costs associated with a workers work-related disability.

APPEALS PROCESS, LEGAL AND POLICY ISSUES (25-48)

Issue #25 Roles and use of indexing of benefits (39)

Background and Discussion
The Yukon Workers Compensation Act provides the following indexing provisions.
48(1) On the anniversary of the date that a worker's loss of earnings began, the average weekly earnings of a worker, for the purposes of paragraph 37(a), shall be increased on the first day of the month immediately following by the sum, if any, of
(a) two per cent, to allow for any increases due to promotion and advancement which the worker might reasonably be expected to have received but for the work-related disability; and
(b) the percentage change between the average wage for the year and for the immediately preceding year.
2) Despite subsection (1), a worker's average weekly earnings shall never exceed the maximum wage rate for the year of review.

The Yukon and the NWT/Nunavut are the only jurisdictions that do not use an indexing formula that is based on the Canadian consumer price index to adjust benefit levels.
The Yukon is the only jurisdiction to provide an adjustment for foregone promotion and advancement opportunities.

Why are benefits indexed?
Benefits are indexed to ensure they continue to provide purchasing power in future years that is relatively equivalent to what existed when the benefit was established. Employer's premiums are not normally affected by indexing because the system calculates the present value of the future liability of an injury using a discount rate of 3.5%. It is the responsibility of the Board to set this rate. This means that the board's investment returns on the accident fund are expected to return at least 3.5% plus an amount equal to the benefit inflation increase related to indexing. To protect the fund against excessive inflation some boards have placed a cap on the level of indexing that will apply.

What formula do other jurisdictions use?
In applying the CPI adjustment four jurisdictions (New Brunswick, Newfoundland and Labrador, Quebec, Saskatchewan) use the full amount of the CPI.

Manitoba uses the full amount of CPI to a maximum of 6%.

British Columbia uses the CPI less 1% with a cap of 4%.

Ontario uses ½ CPI less 1% with a cap of 4% however, it uses the full amount of the CPI for individuals who are 100% disabled, have suffered 100% future economic loss or are survivors of workers who suffered a fatal accident.

Alberta indexes to the Alberta CPI less 0.5%.

Prince Edward Island uses ¾ of the Charlottetown CPI to a maximum of 4%.

Nova Scotia uses ½ the Nova Scotia CPI.

Compensation benefits are indexed to some measure of price inflation such as the consumer price index (CPI). The exception to this is in the Yukon where compensation benefits are indexed according to a pair of factors which do not make direct reference to price inflation.

Annual changes in the Yukon's average wage have been highly variable over the 1993 to 2003 period. The high degree of variability in the Yukon's average wage has contributed to wage loss benefit cost of living adjustments as high as 5.8 percent and as low as 0.0 percent. A steep drop in average wages in the 2000 reference year would have resulted in a rollback of wage loss benefits if not for the Board practice of implementing only positive adjustments to wage loss benefits.

In comparison, the two CPI-based approaches used in other Canadian jurisdictions where the change is tied to the increase in the cost of living have been much more stable over the same period. Using the same reference period definition as specified for the calculation of annual changes in the average wage, the annual change in the CPI for Whitehorse during the 1993 to 2003 period ranges from a low of 0.5 percent to a high of 3.3 percent. The annual change in the CPI for Canada exhibited similar stability over the same period ranging from a low of 1.0 percent to a high of 3.2 percent.

Options

1. No change to legislation
2. Amend the legislation to tie the annual adjustment of benefits to the Canadian or the Whitehorse CPI. This would be more consistent with the basic approach used in most other Canadian jurisdictions.
3. Amend the legislation to tie the annual adjustment of benefits to the Canadian or the Whitehorse CPI less 1%, with a minimum of 0% and a maximum of 4%.

Issue #26 Adequacy of the system for spouses (40)

Background and Discussion
The YWCHSB submission on this Issue provides a thorough analysis of the benefits provided to spouses and dependents in other Canadian jurisdictions as well as outlining the benefits provided in the Yukon. The submission is copied below for reference.

Yukon Situation:
In terms of one time benefits, the YWCHSB will cover actual funeral costs (to a maximum of $4,000) and additional expenses incurred as a result of a workers' death (up to a maximum of $2,000). A concern that was raised is whether the amount of the one time benefit is sufficient to cover the transport of the body for cremation at a location distant from the Yukon since no local cremation facilities exist. Current legislation also provides for payment of reasonable and actual costs of transporting the body of the deceased to a location within Canada.

In terms of ongoing benefits, the surviving spouse of a worker who dies as a result of a work-related disability is entitled to a monthly payment equal to 3.125 percent of the maximum wage rate for the year of payment. The annual amount is (37.5% X 48,825 = $18,309.37) The monthly payment does not cease upon what would have been the 65th birthday of the deceased worker nor does it end upon the surviving spouse reaching the age of 65; it is paid for the life of the surviving spouse. The YWCHSB also has discretion under current legislation to pay an additional monthly amount to the surviving spouse when, in the Board's opinion, the surviving spouse is in need.

Similar to the monthly payments made to spouses, benefit payments for dependent children are calculated as a percentage of the maximum wage rate in a given year. That percentage is currently equal to 1.25 percent. Payments are made until a child reaches the age of 19 or until the age of 21 if the child is in full-time attendance at an education institution recognized by the Board and is making progress satisfactory to the Board.

The Yukon legislation makes provision for dependent children who become orphans as a result of the work-related death of a parent. The legislation also provides that the Board may pay compensation to any other dependent of a worker whose death was work-related.

Inter-Jurisdictional Research:
The various approaches used by different jurisdictions are exceptionally complex.

One–time Benefits
Workers' compensation authorities in all jurisdictions pay for funeral expenses. All jurisdictions, with the exception of British Columbia, also pay for the transportation of the body. Some jurisdictions (Manitoba, New Brunswick, Newfoundland and Labrador, Ontario, Prince Edward Island and Quebec) pay for "necessary costs" or "actual costs". Only Saskatchewan and Yukon do not pay any form of additional lump sum over and above these payments.

Ongoing Benefits
Basis of Benefit Calculation: All 10 provincial jurisdictions base the calculation of survivor benefits on some measure of the amount the worker would have received in wage loss benefits had the injury not been fatal but had instead resulted in permanent total disability. In contrast, workers' compensation authorities in the Yukon and the Northwest Territories/Nunavut calculate survivor benefits as a percentage of the maximum wage rate.

Duration of Benefits: Some jurisdictions (Alberta, Manitoba, Quebec, and Saskatchewan) "front-end load" the payment of spousal benefits by paying the same or almost the same amount of benefits that the worker would have received but only for a limited number of years. All four jurisdictions which "front-end load" spousal benefits also make rehabilitation assistance and vocational counselling available to surviving spouses in order to assist with labour market (re)entry.

Workers' compensation boards in the Atlantic provinces pay spousal benefits until what would have been the worker's 65th birthday or until the spouse reaches the age of 65. Three jurisdictions (New Brunswick, Nova Scotia and Saskatchewan) pay an annuity to surviving spouses based on additional amounts set aside. British Columbia, Northwest Territories/ Nunavut, Ontario and the Yukon pay spousal benefits for life.

Most jurisdictions pay benefits for surviving children in the form of a given amount per child per month.

Age of Surviving Spouse: With the exception of three jurisdictions (British Columbia, Ontario and Quebec) ongoing survivor benefit amounts are not varied according to age of the surviving spouse. British Columbia and Ontario reduce the amount of benefits as a surviving spouse gets older. In British Columbia a surviving spouse with no dependents only gets a lump sum payment. In contrast, Quebec varies the duration of the period for which benefits are payable (and not the amount of the benefits).

Integration of Canada Pension Plan Benefits: In addition to entitlement to ongoing workers' compensation benefits, spouses and children of fatally injured workers also generally become entitled to Canada Pension Plan (CPP) survivor benefits upon the death of the worker.
- Alberta, Manitoba, Nova Scotia, the Yukon and the Northwest Territories/Nunavut make no reduction for CPP benefits.
- British Columbia, New Brunswick, Newfoundland and Labrador, Ontario, Prince Edward Island and Quebec all reduce workers' compensation survivor benefits by the full amount of CPP benefits paid as a result of the workers' death.
- Saskatchewan deducts 50 percent of CPP benefits payable to the surviving spouse after spouse has been in receipt of workers' compensation survivors benefits for 12 months.

YWCHSB Analysis/Comments:
The adequacy of the system of benefits available to spouses in the Yukon can be examined according to two frames of reference. The first frame of reference is relative adequacy and the second is absolute adequacy.
An examination of relative adequacy would require comparing the Yukon's package of benefits with packages available in other jurisdictions. While the information presented provides a preliminary assessment of the differences between jurisdictions, a thorough examination will require advanced analysis.
An examination of the absolute adequacy of the Yukon's package of survivor benefits would require comparing the level of support provided by the workers' compensation system against some measure of a "reasonable standard of living" for the Yukon. A key difficulty in making a determination of absolute adequacy will be achieving agreement on what constitutes a reasonable standard of living at a given point in time.
It should perhaps again be pointed out that the Yukon approach is simple, transparent and presumably efficient in terms of administrative costs. It cannot be disputed that an adequate system of benefits is of exceptional importance to those who survive fatally injured workers. However, in a small jurisdiction such as the Yukon where the number of individuals who survive fatally injured workers each year is very small, the costs of administering a complex set of rules

could easily outweigh the additional benefits of an approach more finely-tuned to individual circumstances.

There is no doubt that it is difficult to find a common approach across Canadian jurisdictions. The current legislation in the Yukon does not discriminate on the basis of the workers' average earnings at the time of death but defaults to the maximum wage rate. A worker with a permanent disability and a wage rate of $43,000 per year would receive the same monthly payment as a surviving spouse under the current legislation.

Some survivors of fatally injured workers may therefore receive more than if the calculation were based on a percentage of the workers actual average earnings and others may receive less.
Since the frequency of fatal accidents appears to be less than one a year, the cost of any amendment to the existing legislation would be small.
The one area that might be addressed is the provision of vocational rehabilitation benefits and counselling to the surviving spouse.

Options

1. No change to legislation.
2. Dependent on a study conducted by the Board to determine the absolute adequacy of the spousal benefit compared to some measure of a "reasonable standard of living" for the Yukon, the benefit levels could be adjusted in legislation.
3. Add a section to the legislation that provides where compensation is payable as a result of the death of a worker, the Board may make provisions and expenditures for the training or retraining of a surviving dependent spouse and the Board may, where it considers advisable, provide counselling and placement services to dependents.

Issue #27 Limitation of legal rights as they relate to vehicles (41)

Issue # 28 Definition of a vehicle (83)

Background and Discussion
These two Issues are discussed together since they are closely linked.
The pertinent sections of the Act for these Issues are:
55(1) No action lies for the recovery of compensation and all claims for compensation shall be determined pursuant to this Act.
(2) This Act is instead of all rights and causes of action, statutory or otherwise, to which a worker, a worker's legal personal representative, or a dependant of the worker is or might become entitled to against the employer of that worker or against another worker of that employer because of a work-related disability arising out of the employment with that employer.
(3) If a worker suffers a work-related disability and the conduct of an employer who is not the worker's employer, or of a worker of an employer who is not the worker's employer, causes or contributes to the disability, neither the worker who suffers the disability, nor their personal representative, dependant, or employer, has any cause of action against that other worker or other employer.
(4) Subsection (3) does not apply when the disability arose from the use or operation of a vehicle.
(5) Any party to an action may, on notice to all other parties to the action, apply to the board for a determination of whether the right of action is removed by this Act.

Yukon's Act definition of a vehicle
"vehicle" means any mode of transportation the operation of which is protected by liability insurance;

56(1) If a worker suffers a work-related disability and the worker, the worker's legal personal representative or the dependants of a deceased worker have a cause of action in respect of the disability, the board is deemed to be an assignee of the cause of action and the board is vested with all the rights to any cause of action arising out of the work-related disability.

(2) If the board becomes an assignee of a cause of action pursuant to subsection (1)
(a) an action may be taken against any person by the
(i) worker or the worker's legal personal representative or dependants, with the consent of the board, or
(ii) board in the name of the worker, the worker's legal personal representative, or dependants without the consent of the person in whose name the action is taken;
(b) the persons named in subparagraph (a) (i) may be indemnified by the board for those costs approved by the board related to the action;
(c) no payment or settlement may be made in respect of the cause of action without the prior approval of the board, and any settlement agreed to without the prior approval of the board is void;
(d) the board may, at any time, agree to a settlement with any party regarding the cause of action of a worker or a worker's dependants for any amount or subject to any conditions the board considers appropriate.

(3) Money recovered in an action or settlement of an action pursuant to this section shall be paid to the board, and

(a) if the money is accepted in full settlement of the cause of action, the board shall release the person paying the money or on whose behalf the money is paid from all liability in the cause of action;
(b) if the judgment of the court under which the money is received clearly indicates that a portion of the award is for pain and suffering of the worker resulting from the cause of action, the board may pay to the worker after payment of all costs of the action, an amount that bears the same proportion to the money remaining in its hands as the portion of the award that is attributable to pain and suffering bears to the total award; (c) any money received as a result of action taken or negotiations carried on by the board, the worker, the workers' legal personal representative or dependants, shall be paid by the board to that person, after deducting all costs of the action, an amount equal to (i) 25 per cent of the gross amount received by the board, or (ii) if a payment has been made to the worker pursuant to paragraph (b), 25 per cent of the money remaining after payment has been made under paragraph (b); and (d) if any money remains after making the payments pursuant to paragraphs (b) and (c), and the remainder is in excess of the cost, as determined by the board, to the board of the worker's disability, the excess shall be paid to the worker, the worker's legal personal representative or dependants, as the case may be.
(4) In an action taken under subsection (2), a defendant may not bring third party or other proceedings against any employer or worker against whom the plaintiff may not bring an action because of this Act, but if the court is of the opinion that that employer or worker contributed to the damage or loss of the plaintiff, it shall hold the defendant liable only for that portion of the damage or loss occasioned by the defendant's own fault or negligence.

In summary, subject to subsection 55(5), and section 56, an injured worker is not barred by the legislation from bringing an action against another employer or workers of that employer covered under the Act if the disability was caused or contributed to by the use of a vehicle.

However, in the Yukon, there are no prohibitions regarding the payment of compensation to a worker or their dependents where the injury arose out of or in the course of employment, regardless of whether the injury involved a vehicle and resulted in an action against a defendant.

What do other Canadian jurisdictions have for right of action and definition of a vehicle?
The right to an action in other Canadian jurisdictions is often bound by the definition of a vehicle. Most often the definition defers to a vehicle as defined in the jurisdictions equivalent of a *Motor Vehicles Act* as required to be insured by liability insurance or some clause the province or territory may craft.

In British Columbia, the injured worker must elect within 3 months of the injury occurring to receive compensation from the board or bring an action against the vehicle insurer. When the worker elects to receive compensation, the board most often brings an action against the insurer.

In Manitoba, the limitation on right of action does not apply where the accident results from the use or operation of a motor vehicle, as defined in the *Highway Traffic Act*.

In Newfoundland and Labrador and New Brunswick the limitation of right of action does not apply where the mode of transportation is such that liability insurance is required to be carried, or the disability is caused by the use of a motor vehicle.

In NWT/Nunavut the limitation to a right of action does not apply where an accident is caused by a motor vehicle as defined under the *Motor Vehicles Act* or during the use or operation of a motor vehicle, or use of a motor vehicle outside the definition under the Act or by use of a mode of transportation where the accident is covered by liability insurance.

Nova Scotia does not compensate where injury is caused by use of a motor vehicle registered or required to be registered pursuant to the *Motor Vehicles Act.*

Price Edward Island has similar legislation to Nova Scotia and does not limit the right of action where the accident is covered by the *Highway Traffic Act.*

Ontario does not extinguish the workers right of action where the motor vehicle, machinery or equipment on a purchase or rental basis is supplied by the employer without supplying workers. Benefits are provided where an accident occurs on a vessel, train, aircraft or vehicle used to transport passengers or goods under certain conditions.

Quebec does not consider that an employment injury has occurred if it arises out of or in the use of a vehicle covered by the *Automobile Insurance Act*, or compensation is payable under the Act to promote good citizenship or the *Crimes Victims Compensation Act*

No reference to limitation on legal rights as it relates to vehicles in Saskatchewan or Alberta.

Eight Canadian WCB jurisdictions defer the definition of a vehicle to that contained in their respective *Highway Traffic Act, Motor Vehicle Act or Automobile Insurance Act.*
Some jurisdictions extend that definition to include a mode of transportation other than a motor vehicle, or where the accident is covered by public liability insurance.
Several Provinces do not have clauses that explicitly address coverage with respect to injuries related to other modes of transportation such as aircraft, boat, train, truck or bus.

Maintaining a broad definition of a vehicle, combined with the fact that a worker whose injury arises out of or in the course of employment receives compensation ensures that the worker/dependents are protected and also provides the WCHSB the opportunity to protect employers by recovering through an action some or all of the related costs from other insurers of the vehicle when insurance exists. This approach is consistent with all other jurisdictions.

Options

1. No change to legislation
2. Amend the legislation by removing Subsection 41(5) and the definition of a vehicle and amend subsection 56(1) to read. "Where the cause of the injury, disablement or death of a worker is such that an action lays against some person, other than an employer or worker within the scope of the Act, the worker or dependent may claim compensation or may bring an action. If the worker or dependent elects to claim compensation, he or she must do so within 3 months of the occurrence of the injury or any longer period that the Board allows." The broad definition of person includes a company. Some other consequential amendments may be required. This change would mean a worker/dependent, within 3 months, must choose to receive compensation or bring an action – they cannot do both. If compensation is chosen then the Board can bring an action.
3. Amend the legislation to specify the definition of a vehicle does not include off-road equipment such as loaders and dozers, etc operating on private property.

Issue #29 Division/control of subrogated claims (42)

Background and Discussion
The applicable section of the Act is as follows.
56(1) If a worker suffers a work-related disability and the worker, the worker's legal personal representative or the dependants of a deceased worker have a cause of action in respect of the disability, the board is deemed to be an assignee of the cause of action and the board is vested with all the rights to any cause of action arising out of the work-related disability.

(2) If the board becomes an assignee of a cause of action pursuant to subsection (1)
(a) an action may be taken against any person by the (i) worker or the worker's legal personal representative or dependants, with the consent of the board, or (ii) board in the name of the worker, the worker's legal personal representative, or dependants without the consent of the person in whose name the action is taken;
(b) the persons named in subparagraph (a) (i) may be indemnified by the board for those costs approved by the board related to the action;
(c) no payment or settlement may be made in respect of the cause of action without the prior approval of the board, and any settlement agreed to without the prior approval of the board is void;
(d) the board may, at any time, agree to a settlement with any party regarding the cause of action of a worker or a worker's dependants for any amount or subject to any conditions the board considers appropriate.

(3) Money recovered in an action or settlement of an action pursuant to this section shall be paid to the board, and
(a) if the money is accepted in full settlement of the cause of action, the board shall release the person paying the money or on whose behalf the money is paid from all liability in the cause of action;
(b) if the judgment of the court under which the money is received clearly indicates that a portion of the award is for pain and suffering of the worker resulting from the cause of action, the board may pay to the worker after payment of all costs of the action, an amount that bears the same proportion to the money remaining in its hands as the portion of the award that is attributable to pain and suffering bears to the total award;
(c) any money received as a result of action taken or negotiations carried on by the board, the worker, the workers' legal personal representative or dependants, shall be paid by the board to that person, after deducting all costs of the action, an amount equal to (i) 25 per cent of the gross amount received by the board, or (ii) if a payment has been made to the worker pursuant to paragraph (b), 25 per cent of the money remaining after payment has been made under paragraph (b); and
(d) if any money remains after making the payments pursuant to paragraphs (b) and (c), and the remainder is in excess of the cost, as determined by the board, to the board of the worker's disability, the excess shall be paid to the worker, the worker's legal personal representative or dependants, as the case may be.

(4) In an action taken under subsection (2), a defendant may not bring third party or other proceedings against any employer or worker against whom the plaintiff may not bring an action because of this Act, but if the court is of the opinion that that employer or worker contributed to the damage or loss of the plaintiff, it shall hold the defendant liable only for that portion of the damage or loss occasioned by the defendant's own fault or negligence.

The YWCHSB summary in their response submission to the Discussion Paper fairly summarizes the legislation of the other Canadian jurisdictions on this Issue and is copied below.

There would appear to be no jurisdiction where Board consent is not required, explicitly or implicitly.
Alberta is clear that no payment shall be made to the worker, the worker's legal personal representative or the worker's dependants for rights or in respect of any claim, cause of action or judgment except with the consent of the Board and any payment or settlement made in contravention of this clause is void.

While British Columbia does not explicitly address payment control, it states the amount that will go to a worker or dependant(s) based on amounts collected and those entitled under compensation. It is clear that the Board has exclusive jurisdiction to determine whether to maintain an action or compromise one and its decision is final and conclusive.

Manitoba addresses disposal of money recovered and that it will keep funds collected to be applied in or towards future compensation payments or pay recipient excess funds after authorized expenses. A compromise settlement shall be made only with written approval of the Board. Circumstances regarding claim vested in the Board is described in detail.
New Brunswick - the board takes on subrogation of rights and has exclusive right to determine whether it shall maintain, abandon or compromise the right of action. Like BC, it outlines what amounts the worker will receive based on the circumstances.

Newfoundland and Labrador indicate that through claiming compensation the worker or dependants restricts or impairs their right to action as it subrogates such to the Board. Compensation paid is 1st lien again any sum of money recovered. If action or settlement out of court is done without the Board, the Board will not pay compensation if the amount is less than what would have been paid by compensation. The commission has exclusive jurisdiction regarding any alternatives around right of action and its decision is final. Judgments are to be ordered such that money owed is paid to the commission; excess amounts after admin, medical, rehab, etc. are paid out to worker/dependant.

NWT/Nunavut states that where the board has subrogated rights, no payment shall be paid in respect of any claim, cause of action or judgment arising except with consent of the Board and any payment or settlement made in contravention is void. Section 13 (2) addresses procedures for payment out of court. The Board can take action without consent of worker and settle an action as it considers advisable. The Board handles paying out money in different means based on the circumstances and describes what "shall" and "may" be considered in section 13(4).

The Nova Scotia Board is subrogated to receive priority of any amount the worker or dependant receives from any action where compensation is paid prior to date of election. Where no election is received the Board is subrogated to the rights and amount of the cause of action. The Board can pursue action without consent and has full discretion to conduct litigation as it deems appropriate. No other settlements made without approval of the Board will have any affect unless authorized by the Board. The Board will pay compensation where the amount collected is under the amount normally paid through compensation. Money received in an action or settlement shall be paid to the Board and excess will be paid to the worker after the possible recovery of medical aid. The Board requires the worker to co-operate or it may suspend, reduce or terminate compensation and the Board maintains authority to release party(s) of liability. Right of action in other jurisdictions is addressed - the Board may request an action or withhold payment until the worker takes action.

Ontario indicates that any surplus for a worker or survivor may be paid by the Board or by the employer and future payments of compensation may be reduced to the extent of the surplus. Amounts of judgment or settlement shall be calculated as including amount of benefits that have or will be received by worker/survivor should there be a reduction or immunity in defendant liability.

Prince Edward Island will pay compensation if the amount received in action is less than compensation. This does not apply where the Board does not give prior written approval to a settlement of right of action. Where compensation is claimed, the Board is subrogated the position of the worker/dependant(s) as a whole or outstanding amount and with or without worker/dependant(s) consent. Failure to cooperate will result in suspension, reduction or termination of compensation. The Board reserves the right to bring any action.

In Quebec immunity of action is provided under the Act unless: an employer commits an offence or indictable offence within the meaning of the Criminal Code: recovery is pursued as the loss sustained exceeds the benefit; certain type of employment injury as per specified section; or if the employer is personally liable for payment of benefits. Time limits for action are contemplated in the Act as well as time limits to notify Commission of action. Any action that is less than the amount provided for under the Act results in beneficiary entitlement to the difference. Any compensation claim subrogates the rights of the beneficiary against the person responsible for the employment injury up to the amount of benefits paid out and capital sum representing benefits to come due. Any agreement regarding recourse in subrogation must be ratified by the Commission. A provision in favour of the Commission via prescription enacted by the Civil Code is in the Part.

Saskatchewan notes that where compensation is paid the board is deemed to be an assignee and is subrogated to all rights of recovery of the person notwithstanding *The Fatal Accidents Act* and may bring or join with the person in recovery of compensation or damages. Money recovered is applied in priority as listed in section 41 of the Act. Action maintained between the board or the worker requires notice between the parties but failure for the board to give notice does not affect the claim of action. No settlement for an action for an amount less than the amount of compensation provided for shall be made without the written approval of the Board.

In the Yukon the legislation states that the board, upon application can determine if the right of action is removed by this Act. The board is deemed to be the assignee of the cause of action and is vested all right to any cause of action arising out of the work-related disability. Action may be taken by the beneficiary or its representatives with the consent of the board and by the board without consent of the person. No payment or settlement may be made in respect of the cause of action without the prior approval of the board, and any settlement agreed to without the prior approval of the board is void.

The board may agree to a settlement for any amount or conditions it deems appropriate. Money recovered shall be paid to the worker, his or her lawyer, or the board and disbursement of such monies are covered in the Act.
In addition, there is a provision regarding a portion of damage or loss with regards to defendant's fault or negligence, and the exemption of bringing third party action to those covered under the Act or noted in the action.

There is really only one option other than the status quo and that is to provide the worker or their dependent with the right to elect, within a defined time frame, whether they wish to receive compensation under the Act or bring an action against the person who is neither a worker or an employer within the scope of the Act.

Options

1. No change to legislation.
2. Delete subsection 56(1) and replace it with a subsection that reads "Where the cause of the injury, disablement or death of a worker is such that an action lies against some person, other than an employer or worker within the scope of the Act, the worker or dependent may claim compensation or may bring an action. If the worker or dependent elects to claim compensation, he or she must do so within 3 months of the occurrence of the injury or any longer period that the Board allows." The broad definition of person includes a company. Some consequential amendments may be needed. This change would mean a worker/dependent, within 3 months, must choose to receive compensation or bring an action – they cannot do both. If compensation is chosen then the Board can bring an action.

Issue #30 Compensation Fund within the Yukon Consolidated Revenue Fund (43)

Issue #31 Financial Administration Act (FAA) and independence of the Board (44)

Issue #32 Authority over the Fund (45)

Background and Discussion
All of these three Issues are closely connected and as such are considered together. The main concern is the autonomy of the Board from the Territorial Government. The administration and control of funds are seen as an intricate part of this relationship. Employers and Workers perceive this fund to be under their control as a protection as part of the "historic compromise" aimed at protecting the future for injured workers. Currently, the Commissioner in Executive Council has ultimate authority over the investment fund.

Current legislation states that all monies spent or received by the Board shall be on behalf of the Government of the Yukon.

The relevant sections of the Act are:
57(1) An account called the compensation fund shall be established within the Yukon Consolidated Revenue Fund into which all monies received by the board shall be deposited.
(2) The compensation fund is a trust fund within the meaning of the *Financial Administration Act* and all amounts received by the board under this Act and income of the fund is trust money within the meaning of the *Financial Administration Act*.
60(1) The receipt and payment of money by the board is subject to the *Financial Administration Act*.
(2) All money received or spent by the board shall be deemed to be received or spent by it on behalf of the Government of the Yukon.
(3) All money owing to the board shall be deemed to be owed to it in its capacity as a representative of the Government of the Yukon.
(4) All proceedings taken by the board for the collection of any money due to the board under this Act shall be deemed to be taken by the board for and on behalf of the Government of the Yukon.
(5) Despite the *Financial Administration Act*,
(a) the investment of money by the board is subject to the *Financial Administration Act*, except section 39 of that Act;
(b) Part VI of the *Financial Administration Act* shall not apply to the collection of any money due to the board under this Act; and
(c) a Management Board directive shall not apply to the board unless the Commissioner in Executive Council prescribes that it shall apply.
(6) Before the Commissioner in Executive Council makes a regulation under paragraph (5)(c), the Minister shall consult with representatives of employers and workers and the board concerning whether a Management Board directive should be made applicable to the board.

61(1) Subject to section 60, the board may invest the compensation fund in any investment permitted by the *Trustee Act*.
(2) The compensation fund shall be invested pursuant to an investment policy approved by the members of the board.
(3) Investments acquired pursuant to the investment policy shall not create a high risk portfolio.

(4) Amendments to the compensation fund investment policy may only be made on the recommendation of the members of the board and with the approval of the Commissioner in Executive Council.
(5) Any amendments to the compensation fund investment policy shall be transmitted to all members of the Legislative Assembly within 10 days of approval.

Excerpt from The Trustee Act
Authorized Investments
2(1) Unless a trustee is otherwise authorized or directed by an express provision of the law or of the will or other instrument creating the trust or defining the trustee's powers and duties, the trustee may invest trust money in any kind of property, real, personal, or mixed, but in so doing, the trustee shall exercise the judgment and care that a person of prudence, discretion, and intelligence would exercise as a trustee of the property of others.

Subsection 57(1) requires that the compensation fund, established to provide for future liability related to injuries that occurred in the past, be a part of the Consolidated Revenue Fund albeit set up, administered and accounted for as a Trust Fund separate from the Public Accounts. As such any surpluses or deficits in the fund are not accounted for as part of the Public Accounts.

Section 60 of the Act requires the Board to receive and spend money on behalf of the Government and to operate under the constraint of the Financial Administration Act. .

Although subsection 61(1) of the Act provides the Board with the independence to make investments permitted by the *Trustee Act* and subsection 61(2) provides the Board with the independence to develop and approve an investment policy, subsection 61(4) provides the Commissioner in Executive Council the responsibility to approve or reject any recommended amendments to the investment policy.

It appears that the Accident Fund of no other WCB jurisdiction in Canada is an account under the Province/Territory Consolidated Revenue Fund.

The key question is whether Government wishes to provide the Board and its Investment Committee with more autonomy over the accident fund and its investment policy. This would require changes to the sections of the legislation listed above as well as either quoting the relevant sections of the Financial Administration Act the Government wishes to have applied. Oversight could be provided by having the representative of the Minister of Finance sit on the Board's Investment Committee.

What is the law in other jurisdiction?
An example of greater autonomy is found in the British Columbia legislation which provides in subsection 36(1) of the Act that "The Board is solely responsible for the management of the accident fund and must manage it with a view to the best interests of the workers compensation system."

Oversight is provided through the B.C. Minister of Finance in Section 67 of the Act – "Subject to the supervision and direction of the Minister of finance and Corporate Relations, the Board must cause all money in the accident and silicosis funds in excess of current requirements to be invested and reinvested and in so doing exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments."

Alberta legislation notes the specific section numbers of the *Financial Administration Act* which apply to the Board. Also in Alberta the Lieutenant Governor in Council can make regulations/directives on recommendation from the Treasury Board on the exercise or performance of powers and duties in relation to the Fund.

Northwest Territories & Nunavut references *Financial Administration Act* in the audit of the Board accounts, in accordance with Part IX of the *Financial Administration Act* and consistent with the federal Northwest Territories Act.

Alberta is the only jurisdiction that is given exclusive authority to invest. All other jurisdictions have some investment restrictions. The Northwest Territories & Nunavut and British Columbia must invest under the authority of the *Financial Administration Act.*
Manitoba and New Brunswick must invest under the *Trustee Act*.

Ontario and Saskatchewan follow the *Pension Benefits Act*.

Newfoundland and Labrador, the commission can invest funds but are governed by sections under the *Insurance Companies Act*, the same as an insurance company.

Legislation allows the Board to make policies and regulations in relation to investments, in Newfoundland & Labrador, Prince Edward Island and Ontario. In New Brunswick the Lieutenant Governor can make regulations regarding investments.

Newfoundland & Labrador, Nova Scotia and Prince Edward Island legislation states that the Board can invest and make policies that a reasonable and prudent person would apply in respect of a portfolio to avoid undue risk of loss and obtain a reasonable return.

In British Columbia accounting systems must meet approval of Minister of Finance and Corporate Relations.
Manitoba the accounting system must meet approval of Minister of Finance.

The costs of bodies outside of the board such as the Worker's and Employer's Advisors and the Appeal Tribunal are paid by the Fund in all jurisdictions. In some jurisdictions the board reimburses the Consolidated Revenue Fund and in some cases the board pays directly.

Options

1. No change to legislation
2. Amend the legislation to provide the Board and the Investment Committee with more autonomy, which would include the inclusion of the relevant sections of the Financial Administration Act.

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[47] http://www.awcbc.org/english/board_data.asp

3. Amend the legislation to provide the Board and the Investment Committee with more autonomy, which would include the inclusion of the relevant sections of the Financial Administration Act and provide the Minister of Finance with oversight of the investment policy.

Issue #33 Access to employer's safety and claims cost information (48)

Background and Discussion
Access to individual employer's safety and claims cost information is not available to workers or other employers for the same confidentiality reasons that a worker's claims record is not available to employers or other workers. The YWCHSB although not covered by the Access To Information and Protection of Privacy Act (ATIPP) continues to follow the principles of that legislation as though it did apply and protects the worker's and private information.

It may seem appropriate that a worker would want to know whether a prospective employer has had many claims or for an employer hiring a contractor to wish to know the contractors safety and claims record. Similarly, it may seem appropriate for an employer to want to know how many claims and how serious they were before hiring a worker or for a fellow worker to wish to know if the person he/she is working with is accident prone.

Except for sharing pertinent information to an employer, a worker or their designated representative for the purposes of a Review or an Appeal, no other jurisdiction in Canada has legislation for the release of employers safety and claims cost to another employer or worker.

Options

1. No change to legislation.
2. Amend the legislation to recognize YWCHSB as a public body under the ATIPP act and that the ATIPP legislation applies to the disclosure of board records.
3. Amend the Workers Compensation Act by adding a section that states that all employer and worker records are available on request.

Issue #34 Incentive programs (49)

Background and Discussion
The pertinent sections of the Yukon Workers Compensation Act are:
Employer's Experience Accounts
55. (1) The board shall maintain experience accounts for each employer, indicating the assessments levied and the cost of all claims chargeable in respect of the employer.
Merit Rating
57. The board may, by order, adopt a system of merit rating for employers.

Experience rating, for WCB assessment rate-setting, generally shifts a greater degree of the responsibility for workers' compensation costs from the industry rate group as a whole, to the particular employers actually incurring the injury costs. Where experience rating is used, the rate of assessment payable by an employer may vary above or below the standard rate applicable to the rate group or subclass. Most experience rating programs modify an individual employer's assessment by comparing the firm's claims cost experience to the average experience for the industry or class in which the employer falls. Some WCBs modify the assessment by comparing the firm's cost experience with the firm's assessments.

Experience rating is intended to serve as an incentive for employers to reduce both the number of workers injured and the length of lost-time by encouraging the employer to establish and maintain safety and prevention programs and to assist the worker to return to work as soon as possible. Employers can accomplish these goals by preventing accidents and injuries in the workplace, by effectively tracking the progress of claims, and by rehabilitating and re-hiring injured workers.

Most workers' compensation jurisdictions in Canada, including the Yukon, have legislative authority conferred on them in their respective Acts to institute experience rating programs. All WCBs, except Northwest Territories/Nunavut, and the Yukon Territory, currently operate some type of experience rating program.

Please refer to appendix "Summary of Experience Ratings" for a complete breakdown of experience rating programs in Canada.

The Association of Workers' Compensation Board of Canada has released its 2003 publication titled "Workers' Compensation Industry Classifications, Assessment Rates, and Experience Rating Programs in Canada 2003", which provides extensive information such as the objectives and types of programs each jurisdiction employs in experience rating.

"Supporters of experience rating maintain that experience rated assessments provide a more equitable distribution of injury costs among employers, and incentive for prevention programs, and a stimulus for claims management programs. Opponents of the programs argue that experience rating compromises the collective liability principle, encourages employers to control costs after an injury has occurred through under-reporting, and diverts attention away from accident prevention to claims cost control." [47]

Options

1. No change to legislation
2. Amend the legislation such that the Board is mandated to merit rate employers. (Assessment rates to employers relative to their experience).
3. Amend the legislation to direct the Board to institute an incentive policy based on the employer experience rating as well as their prevention activities.
4. Amend the legislation such that there is no merit rating, all employers in a class/subclass would pay the same rate regardless of the workplace's injury experience.

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[49] www.awcbc.org/english

Issue #35 Process for collection of assessment and penalties for late or non-reporting (52)

Background and Discussion

The pertinent sections of the legislation are:

64(1) The board shall assess employers for any sums that the board may require for the administration of this Act.

(2) Assessments shall be made in the manner, form, and procedure directed by the board.

(3) Assessments shall, in the first instance, be based on estimates

(a) of the employer's payroll for the year furnished under section 76; or

(b) as determined by the board under section 77.

(4) The board shall, by order, establish a minimum assessment.

65(1) All assessments are due on January 1 in the year for which they are made.

(2) The board may provide for the payment of assessments by instalment, in which case the assessment for the year is payable on the dates determined by the board.

66(1) The board has a cause of action for any unpaid assessment and is entitled to the costs of any action to recover the unpaid assessment.

(2) If, for any reason, an employer liable to assessment is not assessed by the board, the employer is liable for the amount for which the employer should have been assessed, or as much thereof as the board considers reasonable, and payment of that amount may be enforced as if the employer had been assessed for that amount.

74 If an assessment is not paid when required by the board, or security is not provided when required, the board may assess a penalty in an amount equal to 10 per cent of the unpaid assessment or the value of the security required, the payment of which may be enforced in the same manner as the payment of an assessment.

76 (5) Unless satisfactory evidence of an employer's actual payroll for any period is provided to the board, the payroll estimated by the board under this section or under subsection 77(1) is deemed to be the actual payroll of the employer.

77(1) If (a) an employer does not comply with section 76 within the time required by the Act or by the board; or

(b) the information provided under section 76 does not, in the opinion of the board, reflect the probable amount of the payroll of the employer or correctly describe the nature of the work carried on, the board may assess on any sum that is, in the opinion of the board, the probable payroll of the employer or nature of the employer's industry.

Additional penalty for defaults by employer

87 If an employer

(a) refuses or neglects to provide a payroll return or other statement required under this Act; or

(b) refuses or neglects to pay any assessment, or the provisional amount of any assessment or any instalment or part thereof, in addition to any penalty or other liability to which the employer may be subject as a result of their refusal, the board may, in respect of each disability incurred by a worker in their employ that occurs during the period of default, require the employer to pay to the board an additional assessment of up to one-half of the cost, as determined by the board, of the compensation payable in respect of each claim to a maximum of $10,000.

The Yukon Territorial Government is not subject to Part 8 of the Act and as such section 87 does not apply.

The AWCBC provides a comparison of Workers Compensation Legislation in Canada where the reader can compare the fines levied in other jurisdictions.[49]

The YWCHSB has a concern that the Act does not address situations that may arise under the conversion to "Actual reporting of Assessable Payroll".

The current legislation provides the Board with a great deal of discretion with respect to assessments. It appears the broad discretion under subsections 64(2), 65(2) and 87(a) would provide sufficient discretion to the Board to make policy regarding this Issue.

To counter the Issue of under-reporting and underpayment of assessments, some jurisdictions have moved to alternate payment vehicles. Subsection 65(2) of the Yukon's Act provides this flexibility.

For example, the Nova Scotia board has an arrangement with Revenue Canada to collect the assessments from employers biweekly when the employer remits the taxes, CPP and EI deductions on the actual payroll.
The Advantages are:

- Employers are able to pay smaller amounts and payments are always current.
- The board benefits from not being exposed to a large loss if the company fails,
- The board receives assessments in a timelier manner, and
- The auditing done by Revenue Canada precludes the board from duplicating this task.

Another approach would be to provide employers with the ability to have monthly blended assessments deducted from their bank accounts based on the estimated annual payroll.

Options

1. No change to legislation
2. Amend the legislation to provide new penalties for those employers reporting on an actual basis.

Issue #36 Processes for dealing with fraud (53)

Background and Discussion
The pertinent sections of the legislation are:
91 A person required under this Act to provide information to the board who knowingly provides the board with any false or misleading information is guilty of an offence and is liable
(a) on the first conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding six months or both; or
(b) on each subsequent conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding one year or both.
116(2) By order of the board, the president shall conduct an investigation into any matter in connection with the administration of this Act and shall have in connection with the investigation the same powers as the Supreme Court for compelling the attendance of witnesses, examining witnesses under oath, and compelling the production and inspection of books, papers, documents, and objects relevant to the investigation, and causing depositions to be taken.

No workers compensation jurisdiction in Canada has a section in their legislation which specifically deals with fraud. Fraud is a matter covered under criminal law and once it is brought to the attention of the RCMP, they may proceed with criminal charges.

Most jurisdictions have investigation officers and a fraud "hot line" where members of the public or board staff can report suspicion of fraudulent activity. Larger jurisdictions such as Ontario and British Columbia have aggressive programs to deal with fraud. These are very expensive administratively and an investigation may take from many months to years to bring before the court system. Once fully operational, these programs do recover more than they cost to operate however; they also bring criticism of the organization for aggressive investigation.

These jurisdictions find the largest frauds in terms of dollar amounts are committed by employers and usually involve suppression of claims severity or failure to report claims. British Columbia's fraud hot line showed that almost 40% of the calls were related to employers and 50% to suspicion of worker fraud, the balance related to suppliers.

The investigators often find that reports of worker fraud are unfounded. The worker's neighbour or acquaintance reported that the worker was active and able to do work around the home and should not be on benefits. Most often, on investigation, the worker was being encouraged by their therapist to increase activity as part of the recovery/work hardening clinical rehabilitative process.

Options

1. No change to legislation
2. Amend the legislation to compel the Board to investigate any allegation of fraud and commence prosecution if so warranted.

Issue #37 ATIPP (Access To Information and Privacy Protection) (54)

Background and Discussion

The Issue relates to a determination by the Yukon Information and Privacy Commissioner that the Board is not a public body as defined in the Access to Information and Protection of Privacy Act and therefore not subject to the Commissioner's jurisdiction.

The Board passed policy GC – 13 which outlines that the Board shall handle requests in a similar manner as the Privacy Commissioner had in the past. However, a major component that is lacking is any independent review of the Board's decisions.

Options

1. No change to legislation.
2. Amend the legislation to recognize YWCHSB as a public body under the ATIPP act and that the ATIPP legislation applies to the disclosure of board records.

Issue #38 Employer education and representation/ Employer's Advocate/Consultant (55)

Issue #39 Worker education and representation/ Worker's Advocate (56)

Background and Discussion
These two Issues are discussed together as they are closely linked. The pertinent sections of the legislation dealing with the workers advocate and the duty of the board to promote awareness of both workers and employers are as follows.

13(1) The Minister of Justice shall appoint a workers' advocate who, from the date of appointment, shall be a person appointed to a position in the public service.
(2) The workers' advocate shall
(a) advise workers and the dependants of deceased workers on the intent, process, and procedures of the compensation system, including the administration of the Act, the regulations, and the policies of the board;
(b) advise workers and the dependants of deceased workers on the effect and meaning of decisions made under the Act with respect to their claims for compensation; and
(c) assist, or at their request, represent a worker or a dependant of a deceased worker in respect of any claim for compensation, including communicating with or appearing before an adjudicator, hearing officer, or appeal committee.

(3) The workers' advocate may refuse to perform any or all of the duties under subsection (2) if, in the opinion of the workers' advocate
(a) no legitimate claim for compensation can be advanced by or on behalf of the worker or the dependants of a deceased worker; or
(b) the expectations of the worker or the dependants of a deceased worker are unreasonable in the circumstances of the claim.

(4) The workers' advocate shall provide written reasons for any refusal under subsection (3) to the worker or the dependants of a deceased worker.

(5) The Minister of Justice shall prepare an annual budget for the workers' advocate and, following consultation with the board, approve the budget, which shall be paid out of the compensation fund.

(6) Within 90 days after the end of each calendar year, the workers' advocate shall submit a report summarizing the workers' advocate's activities in the preceding year and accounting for expenditures in that year to the Minister of Justice who shall make the report available to the board, organizations representing employers and workers, and the public.

(7) Subject to the budget approved by subsection (5), and the *Public Service Act*, the workers' advocate may employ a deputy and any other employees or contract for the provision of any services that the workers' advocate considers necessary for the efficient operation of the office of the workers' advocate.

Subsection 108 (k) requires the Board to "promote awareness of the basic rights and obligations of workers and employers under this Act."

Why do workers compensation systems in Canada have worker and employer advisors/consultants?
Workers compensations systems are very complex environments. Most of the workers or their dependents who will be required to interact with the system will be unsophisticated with respect to its operation, as will a majority of employers especially small employers. However, the determinations reached by decision makers within the system can have a profound impact on workers and employers.

For instance, the economic impact of work-related disabilities can be substantial for many workers. The legislation sets out an elaborate entitlement, review and appeal system which will apply to the disabled worker or a dependent who is seeking to obtain any compensation benefits which are payable to him/her. Most workers or dependents will not have the experience or knowledge, on their own, to ensure they receive whatever entitlements they have pursuant to the legislation and the Board's policies.

Similarly, the legislation and regulation poses significant financial, administrative and prevention obligations on employers. Failure to meet these obligations can have a substantial impact on employers. For example, an employer who fails to meet its occupational health and safety obligations can be subject to significant enforcement penalties.

Access to adequate, knowledgeable, and timely assistance is essential to both workers and employers to effectively participate in a system based on significant statutory entitlements and obligations.

If the system is not user friendly and understandable to the participants and adequate assistance provided, the level of frustration and anger among dissatisfied workers and employers will increase. The frustration and anger will no doubt turn outwards from the system – to the legislators, the ombudsman and the media.

The systems in Canada have also provided these resources to avoid a "slide into legalism" where workers and employers must retain a lawyer to represent their case – where typically from one quarter to one third of any financial recovery goes to compensating the lawyer. It is for these reasons Canadian systems provide "lay services" to both workers and employers.

Roles and Duties
Generally the role of both advisors should be to provide their respective constituents with advice, assistance, and when appropriate, representation as well as education and training, consultation and advocacy. The advisors should have a unique perspective into the working of the system and their knowledge, expertise and experience are invaluable aids in identifying perceived strengths and weaknesses of the system. For these reasons the advisors can provide strong insight into proposed legislative, regulation and policy amendments.

The roles and duties of the workers' advocate are clearly outlined in section 13 of the Workers Compensation Act. What might be missing from this section is a secondary focus on providing education about the system to organizations which represent workers.

The employers' advisor /consultant role could be laid out in the statute in a manner similar to that of the workers' advocate in section 13. The specifics in the section should include the authority to provide advice, assistance and, where the employers' advisor determines it appropriate to do so, representation to an employer on any matter of worker compensation, assessments or occupational health and safety. The employers' advisor office should also provide educational and training services to the employer community to de-mystify the system. Both offices should be funded by the system with budgets approved by the same Minister and carry the same level of accountability.

Options

1. No change to legislation.
2. Amend the legislation to include the employers' advisor /consultant role and duties. This would include education and training of employers.
3. Amend section 13 to include education and training as a role of the worker's advocate. Repeal subsection 108(k) to remove the Board's obligation.

Issue #40 Limitation periods for appeals to the Appeal Tribunal and to the Board (72)

Background and Discussion
This Issue was partly discussed under Issue #4 (Benefits during the appeal period)

The Yukon legislation has no time limits (except for employer's appeals of assessments or occupational health and safety matters) on when an Issue can be brought before or dealt with by the Board, the Review Process or the Appeal Tribunal. By regulation the Appeal Tribunal has 45 working days to Issue a decision and a hearing officer has 30 days to Issue a decision.

The majority of Canadian jurisdictions currently appear to have time limits for appeals. Regardless of the time limit, extensions are generally permitted upon application.

Alberta requires one year for both internal and external appeals.

BC currently requires between 30 and 90 days, depending on the Issue under appeal. In British Columbia the appeal system was described as never ending, untimely and provided the opportunity for claimants to cycle through the appeal processes - this became know as the treadmill effect. Prior to passage of legislation placing time limits on the processes and reducing the levels of appeal, it was not uncommon for a worker to take 3 to 4 years to exhaust all levels of appeal. The delay in B.C. was also, in part, as a result of years of constraining resources for the appeal body.

New Brunswick requires one year for appeals to its Appeal Tribunal.

Newfoundland and Labrador requires appeals to the chief review commissioner be made within 30 days of the decision. An application for reconsideration must also be within 30 days.

In Ontario, where there has been a request by an employer to access the health records of an employee, and the worker has objected, the Board shall decide the Issue and this decision may be appealed to the Appeals Tribunal within 21 days. An appeal to the Board concerning return to work or labour market re-entry plans must be made within 30 days, and any other case within 6 months. An appeal to the appeals Tribunal must also be made within 6 months.

In Nova Scotia, appeals to the Hearing Officer (internal) must be made within 30 days, as must appeals to the appeals Tribunal.

In Quebec, initial appeals must be made within 30 days to the regional Administrative Review Department. Further appeals to the Commission des lesions professionelles are required within 45 days.

In PEI the board may reconsider a decision if requested within 90 days.

Manitoba, Saskatchewan and NWT/Nunavut have no time limits

There are direct financial implications of having no limitation period on appeals, particularly since older claims have a disproportionate impact on claims benefit liability. There are also service implications as resources must be diverted from processing current claims to deal with these older claims. Not having some form of closure in terms of time limits for appeals can have a negative impact on the claimant's successful recovery and reintegration into the workforce. Time limits should not curtail the ability of a worker to bring substantial, material new evidence about their claim to the adjudicator for future decision with a corresponding right to appeal that decision in the future.

To combat delay, some jurisdictions have placed time limits on each step of the review and appeal process. The time limits apply to both the worker's application for appeal and the length of time from application to a decision by the review or appeal panel.

Yukon regulation currently requires 30 days for decision at the review level and 45 days for decision at the Appeal Tribunal level. These could be included in the Act or remain in regulation

Options

1. No change to legislation.
2. Add legislation that provides strict time frames for each step in the review and appeal process. The legislation should include time limits on application for a review or appeal in addition to the existing time limits in the regulation for decision makers to conclude the review or appeal.

Issue #41 Employee's right to sue the Board for damages caused or exacerbated by the Board's actions (77)

Background and Discussion
Board employees, contractors and health care professionals are in most instances workers or employers and therefore protected against civil action under the Act. The Board does have the ability to pursue action in areas of wilful misconduct or malpractice.

Jurisdiction of the board
112(1) Subject to subsection 25(1), the board has the exclusive jurisdiction to examine, inquire into, hear, determine, and interpret all matters and questions under this Act.
(2) Without restricting the generality of subsection (1), the exclusive jurisdiction includes the power to determine
(a) whether an industry is within the scope of this Act;
(b) whether any person or entity is an employer, and to deem a person or entity to be an employer; and
(c) employment safety.

(3) The acts or decisions of the board on any matter within its exclusive jurisdiction are final and conclusive and not open to question or review in any court.

(4) No proceedings by or before the board shall be restrained by injunction, declaration, prohibition, or other process or proceedings in any court or be removed by *certiorari*, judicial review, or otherwise into any court, in respect of any act or decision of the board within its jurisdiction nor shall any action be maintained or brought against the board, board members, employees, or agents of the board in respect of any act or decision done or made in the honest belief that it was done within its jurisdiction.

Workers compensation systems were established in all developed countries around the world as judicial tribunals to reduce the demand on the court system and on the basis of the "historic compromise" between employer and workers. The systems are provided exclusive jurisdiction in law to determine matters within the scope of the legislation.

Bringing an action in court is a precarious undertaking. There is no doubt that some workers may receive a substantially greater monetary amount by way of a damage award should the court determine that the employer was 100% at fault for the cause of the worker's illness or injury. However, such success would only arise in a small number of cases.
There is no doubt that some workers would receive nothing from the courts (in those cases where the work-related accident was found to be no one's fault, or where the worker was found to be 100% at fault). Once again, this outcome would only arise in a small number of cases.
The vast majority of the cases would presumably fall somewhere between these two extremes. In other words, both the worker and the employer (or others) would be found to have contributed varying degrees of fault which resulted in the worker's disability. The worker's entitlement to recover damages would be reduced by his/her contribution to the cause of the work-related disability.

Bringing an action against one's employer, based on fault, is, generally speaking, an expensive proposition. There would be a significant number of disabled workers who would not have the economic ability to bring such an action. These workers would obviously be greatly disadvantaged by a system based on fault which required the court's intervention, as opposed to a no-fault workers' compensation system.

Bringing a court action against one's own employer, based on fault, often results in irreparable damage to the employment relationship. One of the objectives of the workers' compensation system is to rehabilitate and return an injured worker to work. A primary focus of achieving this objective is to return the injured worker to work with his/her pre-injury employer. This objective is much more attainable through a no-fault compensation system than though a fault driven court action.

If compensation cases were decided by the court system, a worker would plead their case at the initial level of the court system, could appeal that decision to the appeal court if unsatisfied and eventually appeal that decision to the Supreme Court. There is no right to sue the decision maker at any level.

The compensation system is structured to provide a similar decision/appeal path, however the worker is protected from the cost of the hearings at all stages. The employers pay the costs.

The adjudicator provides the first "judgment" in compensation matters – the equivalent of the initial level in the court system. Decisions of adjudicators may be appealed through the internal review process – the equivalent of the appellate court and decisions of hearing officers may be appealed to the Appeal tribunal – the equivalent of the Supreme Court.

Subsection 112(4) of the Act, provides in law that as long as the board officers are making decisions within their jurisdiction there is a prohibition from bringing an action against them. Any decision to change or remove this prohibition would be a fundamental change to the basis of the judicial tribunal system.

Options

1. No change to legislation
2. The Panel was unable to identify an option that was consistent with the Meredith Principles.

Issue #42 Administering prior years' legislation, policy or orders (78)

Background and Discussion
The sections of the Act pertinent to this Issue are:
112(5) The board has the authority to examine, inquire into, and hear any matter that it has dealt with previously and has the power to rescind or vary any decision or order previously made by it.
(6) The board is not bound by their previous rulings or decisions, and all rulings and decisions it makes shall be on the merits and justice of the case before it.

Transitional
104(1) Where a worker is entitled to compensation as a result of a disability caused in
(a) 1982 or earlier, the worker's entitlement to compensation shall be determined pursuant to predecessor legislation as it was in force before January 1, 1983,
(b) 1992 or earlier, the worker's entitlement to compensation shall be determined pursuant to predecessor legislation as it was in force before January 1, 1993,
(c) March 31, 2000 or earlier, the worker's entitlement to compensation shall be determined pursuant to predecessor legislation as it was in force before April 1, 2000.
(1.1)Where a worker, a dependant of a deceased worker or the worker's employer has commenced a review pursuant to section 17 on March 31, 2000 or earlier, the review shall be determined pursuant to predecessor legislation as it was in force before April 1, 2000.
(1.2)Where a worker, a dependant of a deceased worker or the worker's employer has commenced an appeal pursuant to section 18 on March 31, 2000 or earlier, the appeal shall be determined pursuant to predecessor legislation as it was in force before April 1, 2000.

Subsection 112(5) provides the board with broad discretion to reconsider any decision and precludes the ability to bring some finality to a matter that has previously been dealt with.

Section 104 (a), (b), and (c) similarly prevent the ability to bring some finality to the decisions made in the past and open the door to retroactive compensation based on new medical evidence or opinion.

Injured workers are entitled to benefits based on the Act and policies in place at the time their disability arises or when the disability re-occurs. In the Yukon there have been 9 major changes to legislation and several other policy changes. This requires the board to know and apply all of the acts and policies and sort through the maze of entitlement, which is complex, time consuming and costly.

Between this Issue being submitted and this document being prepared the Board has had some clarification surrounding their ability to make policy on previous legislation and apply it from the date of passing into the future. This court ruling[50] addresses the boards concern surrounding ability to develop policy to assist in the future. However, there remain discrepancies in entitlement for workers injured in different years and the administrative burden and cost of dealing with these claims.

Altering entitlements retro-actively, especially when individuals are to be negatively impacted is usually left to the legislators and usually only done with the full knowledge of the effects of their decision.

In the Yukon the compensation system substantially changed after 1982 going from what was a pension system to a wage loss system, changing from a pension for life to a wage replacement till age 65 and then an annuity to assist afterwards.

Options

1. No change to legislation.
2. Amend the legislation to retroactively apply the current legislation to all claimants since 1982.
3. Amend the legislation to retroactively apply the current legislation to all claimants.

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[50] The Workers' Compensation Appeal Tribunal v. The Worker's Compensation Health and Safety Board, 2005 YKSC 5

Issue #43 Access to the Board's independent legal opinions (79)

Background and Discussion
Legal opinions normally carry with them lawyer/client confidentiality. They are simply advice to the client and other legal opinions could well contradict that advice. Unless the legal opinion is placed on the worker's claim file or referenced as a reason for a particular decision then they should remain confidential to the client. The decision maker should be able to provide a reasoned decision based on the merits and justice of the case.

The Board's Governance Handbook requires confidentiality on the part of Board members for legal opinions pertaining to legal matters involving the Board.

Options

1. No change in legislation.
2. Amend the legislation to provide access to the Board's independent legal opinions.

Issue #44 Definition of disability: including chronic pain and chronic stress (80)

Issue #45 Disability vs. impairment (81)

Background and Discussion
These two Issues are linked and discussed together.

Section 117 of Yukon's Act defines disability when it is work-related and permanent impairment as follows:
"disability" in respect of a worker means a work-related incapacity, as determined by the board, including post-traumatic stress, a permanent impairment, or a worker's death;
"permanent impairment" in respect of a worker means a work-related disability, not including death, that is not temporary and includes a disfigurement;
"work-related" in reference to a disability of a worker means a disability arising out of and in the course of the employment of a worker.

The current definition in the Yukon's Act provides the Board with discretion to further define disability in their Board policy. CL-40: Disability defines disability as the limiting, loss or absence of the capacity of an individual to meet occupational demands.

In the Yukon, workers who suffer a work-related disability are eligible for compensation. In other Canadian jurisdictions workers are eligible if they suffer from a personal injury resulting from an accident or occupational disease. Most other WCB legislation in Canada refers to injury and occupational disease where disease often means a disablement as a result of contamination. Definitions used by Canadian Boards for accident, injury and disability are included in Appendix-common definitions.

One needs to consider whether a disability arising out of and in the course of employment includes chronic pain, chronic stress, multiple chemical sensitivity, repetitive strain injuries, environmental illnesses, etc. A major concern is if an individual's condition (chronic pain, chronic stress, multiple chemical sensitivity, repetitive strain injuries, environmental illnesses, etc.) is removed for coverage under the definition of disability, a worker suffering from that condition as a result of work would be allowed to bring civil action against the employer thus violating Meridith principles. Not addressing conditions that are subjective and not easily identifiable medically could drive costs significantly higher. Accepting some conditions at a lower level of impairment awards may be seen as discriminatory under the Charter of Rights and Freedoms.

The number, type and complexity of occupational diseases has increased considerably over the years and created challenges for workers compensation systems in recognizing emerging occupational diseases and compensating for them. Excluding from coverage, by legislation, any of the disabilities mentioned above which may be caused by both occupational and non-occupational factors may lead to claims related to these being actionable in tort.

The cause of a disease, by its nature, may be difficult to establish with any degree of certainty as being due to a worker's employment. Determining the extent to which a worker's employment had in producing the disease becomes a critical Issue for workers compensation systems. Disease causation is generally multi-factorable, involving elements that are occupational and non-occupational. Furthermore, a disease is caused by factors that often occur over a lengthy period of time before they manifest as a disability. The question for workers compensation systems is not whether occupational diseases should be covered under the legislation, but how such diseases should be covered.

The adjudication of occupational diseases involves two questions.

First, is there a causal association between the development of the disease and either exposure to identified substance(s) and/or stressors or employment in the applicable process or industry?

Second, if the answer to the first question is in the affirmative, was the particular worker's disease causally related to exposure to the identified substance(s) and/ or stressors in the applicable process or industry?

The second question is particular to the worker's circumstances. Consideration must be given to a variety of factors, such as

- the duration of the worker's exposure to the identified substances;
- the length of time the worker was employed in the industry;
- the available medical evidence concerning the workers condition;
- other potential causal factors that may have led to or contributed to the workers disease; etc.

In terms of the degree of work-relatedness required to trigger compensation, the question is whether the worker's employment exposure was of "causative significance".

The B.C. Royal commission on the Workers Compensation defined "causative significance" as requiring that work-related factors play more than a trivial role, but does not require that they contribute to a degree of 50% or more. This is called the all-or-nothing test since once the requisite degree of connection (something more than trivial) to the employment is made the worker is entitled to full compensation. If not, no compensation is paid.

Others have argued that there should be adjudication based on proportional entitlement between occupational and non-occupation causal factors, especially when the medical/scientific community can with much greater precision determine the causal contributors to the disease.[51] For example, lung cancers have been accepted using the "causative significance test" even though the occupational factor was attributed to be about 20% and non-occupational smoking attributed to be about 80%. For many disabilities, especially those diseases with multiple factor causation, it is difficult to determine if the disability would have arisen in the absence of the work-related factor(s).

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[51] http://www.labour.gov.bc.ca/labr_pub.htm Legislative and Policy Review.

The B.C. legislation and policy review[52] proposed two alternatives to the "causative significance" approach. A **"dominant cause"** approach where full entitlement to benefits would be provided if the occupational factors contributed 50% or more to the development of the disease and an **"apportionment standard"** which would require a determination concerning the occupational and non- occupational causes of the worker's disease.

Dominant cause is again an all-or- nothing approach albeit with a higher threshold. It could be considered unfair to workers who had greater than 50% non-occupational factors but who would not have suffered any disability were it not for the occupational factors. The review's author acknowledged that a "dominant cause" approach would provide greater administrative difficulties than encountered under the use of the low threshold "causative significance" standard.

The author of the review preferred the "apportionment approach" for three reasons

- It most closely reflects the objective of the legislation – to provide compensation for that aspect of the worker's disease which is due to the nature of the employment.
- It would provide some compensation benefits to all workers who were also entitled by use of a "causative significance" approach however; the amount of compensation entitlement would be based on the degree to which the occupational factors had contributed.
- It is the most appropriate approach for the system to be able to accommodate the anticipated advances in medical/scientific technology and knowledge with respect to the occupational and non-occupational causes of diseases.

The author of the review argued the apportionment method should be simple to administer with only four levels of apportionment related to the occupational factors (25%, 50%, 75% and 100%). The difference between levels is made sufficiently large so that a determination would objectively distinguish one level from the next. If there were more than trivial causative significance the worker would be entitled to 25% of the benefits. For example, the smoker with 20% causation attributed to occupational exposure would receive 25% using this method as opposed to 100% based on a "causative significance" standard.

The key difficulty with the apportionment approach is the investigative intrusion into the worker's personal background and lifestyle. Winter argues that this examination into the worker's personal life is an inherent and necessary aspect of the adjudication of occupational disease claims which cannot be avoided if a fair level of compensation is to be provided that does not disproportionately penalize employers.

Chronic Pain

Even though the Issue is chronic pain, it is worth defining three generic terms – pain, acute pain and chronic pain.

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[52] http://www.labour.gov.bc.ca/labr_pub.htm Legislative and Policy Review.

Pain is an unpleasant sensory and emotional experience associated with actual or potential tissue damage, or described in terms of such damage. Pain is a unique personal experience that cannot be fully shared by anyone else. We cannot transmit pain, but we can communicate pain by words or by behaviour. The understanding of pain is complicated further by the fact that the same painful stimulus may be perceived differently by different people, and differently by the same people at different times. The person's reaction to the circumstances surrounding the pain experience and the interpretation of the pain meaning may also be different. Although pain is personal, private and unique, there is often a demand from others that pain and pain situations be objective, public and reproducible.[53]

Acute Pain coincides with a traumatic injury or disease and the early stages of recovery and eventually resolves, either spontaneously or with some form of treatment. Acute pain is protective. In most instances a local cause is easily recognized, such as a cut finger or sore joint, even though the pain is perceived in the central nervous system. This type of pain responds to analgesic and narcotic medications, and the response to such pain may be modified by cultural and psychodynamic factors.[54]

Chronic pain is defined as pain that persists six months after an injury and beyond the usual recovery time of a comparable injury; this pain may continue in the presence or absence of demonstrable pathology.[55] Chronic pain is not protective. It has very complex and multifaceted features, and cannot be understood by simply applying the concepts of acute pain and its causes and treatments. Chronic pain does not respond well to analgesics and narcotics and is resistant to most traditional therapies for pain. There may not be an easily definable local cause. Only a third of the patients note an event or injury as initiating the pain and in most of these instances, the pain seems out of proportion to the suspected underlying disorder or trauma. chronic pain is not considered to be a mental disorder.[56]

There are significant concerns related to compensating for chronic pain. Chronic pain is very subjective and personal to each individual worker. Its presence cannot be readily validated or objectively measured. Observers tend to view pain complaints as suspicious and with disbelief. It is recognizable only as a problem because the claimant says it is there.

Chronic pain is a common condition that has huge financial costs to society. Chronic pain occurs in about 11 – 54% of the population in various forms, and can develop without any evident cause, or may develop associated with a stress, or injury or specific illness.[57]

Adjudicators face a difficulty in determining if the worker's chronic pain is caused by work-related factors or some other factors. The difficulty is greatest where there is no objective permanent impairment to which the worker's chronic pain can be attributed but the worker continues to have subjective complaints of pain. This is called "Somatoform Pain Disorder".

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[53] Dr. Murray, report on chronic pain to the Nova Scotia WCB
[54] Dr. Murray, report on chronic pain to the Nova Scotia WCB
[55] Ontario – Report of the Chronic Pain Advisory Panel
[56] Dr. Murray, report on chronic pain to the Nova Scotia WCB
[57] Dr. Murray, report on chronic pain to the Nova Scotia WCB

In Somatoform Pain Disorder there is little or no manifest impairment and self reported disability is disproportionate to the impairment.

Somatoform Pain Disorder therefore does not physically disable the person from working, although the individual perceives this to be the case. Someone with Somatoform Pain Disorder does not risk harm by working; to the contrary work is of physical and psychological benefit to someone with Somatoform Pain Disorder.[58]

Workers with chronic pain should be strongly urged to return to work almost immediately if there are no objective signs found by the clinician who only needs a good history and physical examination to classify the type of problem and to decide on its management. Pain alone is an insufficient cause to delay resumption of work.[59]

The originating event in a claim for chronic pain is the compensable injury or illness suffered by the worker. The acute pain is expected and compensable. Because the worker's pain symptoms have become chronic does not mean that the pain is no longer causally related to the originating compensable injury. If the chronic pain is having an adverse impact on the workers earnings capacity then the worker should be entitled to compensation.

Even though it is "somatoform chronic pain" where there is minimal or no objective permanent impairment, there was an originating injury and therefore it is not obvious why this worker's pain should be excluded from further compensation.

The exclusion of chronic pain claims from any entitlement of a permanent disability award under the *Act* may lead to such claims being actionable in tort, and/or result in a legal challenge being brought pursuant to Section 15 of the Canadian Charter of Rights and Freedoms.

An important lesson was learned from the Supreme Court decision in October 2003 where the court ruled that the Nova Scotia WCB must individually assess claims for chronic stress. Nova Scotia has a backlog of 4700 claims for chronic pain stretching back 20 years and which they estimate will cost $168 million.

The challenge of adjudication is described in the AMA Guides (5th edition).

> The assessment of pain-related impairment constitutes a substantial challenge, as it is the most common reason for disability, the most subjective, and perhaps the most multifaceted. Equitable quantification of impairment requires attention to subjective

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[58] BC WCB Task Force on Chronic Pain Syndrome

[59] Dr. Murray, report on chronic pain to the Nova Scotia WCB

> experiences of pain and emotional distress, as well as reports of behavioural impairment, all of which can only be confirmed indirectly. At times, it seems to present the dilemma of being too difficult to perform and too essential to omit.

In determining whether a worker should be compensated for chronic pain it must be found to have an adverse impact on the worker's earnings capacity. Early detection is critical to intervention in order to prevent acute pain from developing into chronic pain. Assessment of vocational, psychological and social factors and remedying any adverse conditions is critical in achieving early return to work despite the pain.

How should chronic pain be compensated?

In British Columbia, Winter suggested that there be a statutory maximum of 20% of permanent disability arising from chronic pain and that the four classes of impairment set out in the AMA Guides be adopted. He suggested that the difference between each level be sufficiently large so as to distinguish one level from another as follows – Mild pain 1-5%, Moderate pain 10%, Moderately Severe Pain 15% and Severe Pain 20%.

Chronic Stress

Stress in varying degrees is a part of everyday life for everyone. Chronic stress which results in a disabling impairment is usually a result of many interacting factors. Adjudicating work-relatedness is extremely challenging in that claimants will have experienced stressors both related and unrelated to the workplace, all of which may have played a causative role.

Employment related decisions such as a layoff or termination for cause are inherent and unavoidable business decisions and it is difficult to argue why a workers compensation system should bear the cost in the event a worker suffers a disabling stressful reaction.

Chronic stress claims are highly subjective complaints and are not readily observable to persons who do not specialize in psychology or psychiatry. The highly subjective nature of the complaints could lead casual observers to believe there is exaggeration and embellishment. The employer's natural inclination is to oppose and refute the allegation of work-relatedness.

The adjudication requires a determination of the extent to which personal or non-work-related stressors may have contributed to the disability. This raises Issues of credibility, relevance of evidence, the invasiveness of the inquiry and may involve the disclosure of highly sensitive medical and personal information.

A major concern for workers compensation systems is the matter of cost and that unrestricted entitlement to compensation for work-related stress will result in unprecedented numbers of claims - "Opening the floodgates". Several Canadian WCBs have excluded stress claims in legislation, except when such claims arise as an acute reaction to a traumatic event.

The Federal Government compensation system in Australia (Comcare) indicates that psychological injury claims comprise 7% of all claims but represent 27% of total claim costs. The system's costs are escalating dramatically and they term this a cost "blow out".[60]

Refer to the YWCHSB response to the discussion paper which summarizes the Canadian legislation in other jurisdictions.

There are reasons why claims for psychological impairment caused by mental stimuli acting over time should not be excluded from coverage. The system was designed to compensate workers for "truly work-caused" disabilities. The causal relationship to the employment and the harm to the worker is what determines the entitlement to compensation not the nature of the harm. Police, firefighters, paramedics and ambulance workers face a number of traumatic events associated with their work. These workers have raised concerns in Ontario that it is the cumulative effect of a series of these traumatic events over time that may finally trigger the acute stress reaction and not the necessarily the latest traumatic event.

Similarly, the cumulative effect of traumatic workplace harassment might trigger a stress claim. Because of such examples, the Ontario WSIB have proposed amendments to its policies to recognize that each traumatic event in a series of events may affect a worker psychologically, even though the worker does not have the acute stress reaction until after the most recent event.

The B.C legislation and policy review recommended that British Columbia adjudicate and accept truly work-related stress claims.

The author of the B.C. review supported the four pronged test for non-physical conditions arising from non-physical and non-traumatic stressors proposed by the BC Royal Commission with the exception of the evidentiary standard. Winter proposed the higher "predominant cause" test be used instead of the Commission's "clear and convincing evidence" test.
The four pronged test as amended follows.

- The condition is medically recognized in the American Psychiatric Association's Diagnostic and statistical manual of mental disorders, Fourth Edition (DSM-IV);
- The condition is established by evidence that meets a "predominant cause test" (greater than 50%) to have arisen out of and in the course of employment;
- The stressors leading to the psychological disability are objectively verifiable and excessive or unusual in comparison with the stressors experienced by the average employee in that type of employment; and
- The stressors leading to the psychological disability are not related solely to work processes, such as labour relations Issues, disciplinary actions, demotions, layoffs, termination or transfer, when done in good faith and in a lawful non-discriminatory manner.

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[60] By Denis Peters
23mar05 [as appearing on the Courier-Mail website-- Attributed to AAP]

Multiple Chemical Sensitivity, Repetitive Strain injury, and Environmental Illness
Workplace related multiple chemical sensitivity and environmental illness are both emerging areas of occupational diseases. Other than on a case by case basis, there is not a lot of experience in the Canadian WCB systems in dealing with claims for these types of exposure. Adjudication depends on evidence that is case specific.

Repetitive strain injuries are common work-related injuries and in some jurisdictions represent up to 10% of all claims. The test for work relatedness often involves an ergonomic assessment of the individual worker's workplace. Proactive employers are performing ergonomic assessments and taking preventative steps to reduce the frequency of these injuries and play an important role in providing early modified return to work programs that accommodate the worker's injury during the healing period.

Options

Due to the complexity of these issues a combination of options may be considered.

1. No change to legislation.
2. Amend the legislation to include a definition of impairment.
3. Amend the legislation to change the definition of disability.
4. Amend the legislation to provide specific guidance on compensation levels for chronic pain and state an evidentiary test that chronic stress claims must meet.
5. Amend the legislation to exclude specific conditions (chronic pain, chronic stress, etc.) from the workers' compensation system.

Issue #46 Definition of compassion (84)

Background and Discussion
The Objects of the Act in subsection 1(h) state.
1(h) to ensure that workers, dependants of deceased workers, and employers are treated with compassion, respect, and fairness.
Furthermore, this subsection is repeated as subsection 107(a) as a duty of the Board.

The addition of these principles in the legislation is to provide explicit guidance to the Board, President and staff of the YWCHSB in the delivery of service to employers, workers and dependents. When a worker, employer or dependent believes they have not been treated with compassion, respect or fairness, there are avenues available to lodge a complaint about the service delivery. Placing a dictionary definition of compassion in the legislation is unlikely to change unsatisfactory service delivery – that is the responsibility of the Board and the President.

The Yukon is the only jurisdiction that includes the word compassion in their Act.

Options

1. No change to legislation
2. Place a definition of compassion in the legislation. Such as: compassion – A strong feeling of sympathy and sadness for the suffering or bad luck of others and a desire to help them.
3. Remove reference to compassion from the Act.

Issue #47 Definition of wholistic approach to rehabilitation (85)

Background and Discussion

The preamble to the Act states in part

> Whereas the workers' compensation system has benefited disabled workers in the Yukon Territory since 1917 and continues to serve both workers and employers well;
> And recognizing that the historic principles of workers' compensation, namely the collective liability of employers for workplace disabilities, guaranteed, no fault compensation for disabled workers, immunity of employers and workers from civil suits, should be maintained;
> And also believing that improvements to the workers' compensation system are desired to ensure that the workers' compensation system continues to meet the changing needs of workers and more adequately reflects the true costs, in both human and economic terms, of disabilities arising out of the workplace and enable a wholistic approach to the rehabilitation of disabled workers;

"Wholistic" is defined by the Random House Unabridged Second Edition as holistic or coming from holism. The Webster's Collegiate Dictionary defines holistic as: relating to or concerned with wholes or with complete systems rather than with the analysis of treatment of, or dissection into parts ~ medicine attempts to treat both the mind and the body.

In the past wholistic has been interpreted to have several different meanings. In referring to wholistic in the preamble **we** are not referring to a type of strategy or treatment but rather, stating that the entire worker will be considered while the Board is providing services as a result of a **workplace accident**. The panel **concludes** that the meaning that best describes "wholistic" is reflected within the Board's Rehabilitation Policy CS-11

According to Board policy CS-11, "The objective of rehabilitation is for an injured worker to overcome, as much as possible, the effects of a work-related disability in order to restore them to their pre-disability level of personal, social and economic functioning. The objective shall be met through a collaborative and client centred approach encouraging informed choices through active participation. Rehabilitation includes physical, psychological and vocational."

Options

1. No change to legislation.
2. Amend the legislation to clarify the definition of "wholistic" and/or use the term "holistic".
3. Amend the Act to remove the guidance for the board to address the wholistic needs of the worker.

Issue #48 Special examinations/reviews (88)

Background and Discussion
The requirement for a Special examination is spelled out in Section 118 of the Act.
118(1) Within 90 days after the coming into force of this section, the board shall submit to the Minister a plan for a special examination of the various elements of the compensation system under this Act, including the role of the board, the workers' advocate, and the appeal tribunal in the system, to take place over the next 10 years.
(2) For the purpose of the special examination, the elements of the compensation system include
(a) operations and administration;
(b) resolving claims for compensation; and
(c) assessments.
(3) A special examination of the operations and administration of the board shall begin no later than six months after the coming into force of this section.
(4) The Commissioner in Executive Council shall appoint one or more examiners to examine the compensation system in accordance with the plan set out in subsection (1) following consultation with the board.
(5) For the purposes of the special examination, the examiner will have access to all records, documents, books, accounts, vouchers, and other information in the possession of the board, the workers' advocate, and the appeal tribunal that the examiner considers necessary to effectively and efficiently conduct the special examination.
(6) The purpose of the special examination shall be to assess the efficiency, effectiveness, and economy of the workers' compensation system.
(7) The scope of the special examination shall be determined by the Minister in conjunction with the board, following consultation by the Minister with the appeal tribunal, the workers' advocate, and representatives of organizations representing workers and employers.
(8) The examiner shall call attention to all matters within the scope of the special examination that in the examiner's opinion should be brought to the attention of the board, the Minister, and the Legislative Assembly.
(9) The results of the special examination shall be reported to the board who shall immediately provide a copy of the report to the Minister, the appeal tribunal, and the workers' advocate and make the report publicly available.
(10) If the special examination is conducted by an examiner other than the Auditor General of Canada, the cost of the special examination shall be paid out of the compensation fund.

Special Examinations, Royal Commissions and periodic reviews are common occurrences in workers compensation jurisdictions in Canada.

For example in British Columbia over a ten year period from 1992 there were four Administrative Inventories of the key administrative functions (Compensation Services and Vocational Rehabilitation, Clinical Rehabilitation, Prevention and Assessments) as well as a follow-up assessment conducted within 3 years.
These were followed by a two year long Royal Commission inquiring into the system. The Royal Commission Study was followed by a 6 month long Legislation and Policy Review and a concurrent Service Delivery Review.

Although it is vital to periodically assess the performance of the system, these examinations and reviews are expensive undertakings and if held too frequently result in staff and stakeholder fatigue and overload. The reviews always develop a list of potential legislative, policy and service delivery recommendations. It may take several years for the implementation of the changes and for stakeholder familiarity with them.

The requirements of section 118 of the Act have been met by the Auditor General of Canada's Special Examination concluded in September of 2002.

A review of the Act is scheduled by subsection 119(2) of the Act for 2013.

The Government has the ability to order a review of any component of the system at any time and thus there should not be a requirement for a further amendment of the legislation to create an obligation in the future.

Options

1. No change to legislation
2. Amend the legislation to conduct a revolving review of the entire system on a basis established by the Auditor General

Appendix A: Weekly Benefits for Temporary Disability Summary 2003 and 2005

Source: Comparison of Workers' Compensation Legislation in Canada 2003 and Comparison of Workers' Compensation Legislation in Canada 2005, Association of Workers' Compensation Boards of Canada.

WEEKLY BENEFITS FOR TEMPORARY DISABILITY – SUMMARY - 2003

Table 10

Juris-diction	% of earnings	Maximum weekly payments	Minimum weekly payments
Alberta	90% of net earnings[1]	$734.72	$256.46 or 100% of net earnings if less
B.C.	90% of net earnings	$864.45	$310.96 or 100% of earnings if less
Man.	After Dec. 31, 1991 90% of net average earnings[1] 80% of net after 24 months of cumulative benefits Before Jan. 1, 1992: 75% of average gross earnings	$674.42[2,3,4] $679.22[5]	$219.99 or 90% of net earnings[3,4,6] $233.36[7]
N.B.	85% of loss of earnings[8]	Single $559.21 Married $586.86	None
NL	80% of net earnings	$513.51[9]	None
NWT & Nunavut	90% of net earnings[1]	$858.85[9]	$443.43 or 100% of earnings if less
N.S.	75% of net earnings for the first 26 weeks 85% of net earnings thereafter	$455.01[10] $515.68[10]	None
Ontario	After Jan. 1/98 85% of net average earnings Prior to Jan. 1/98 - 90% of net average earnings	$807.27 (MF[11]) $807.27 (C[11])	$298.02 (MF[11]) $343.88 (C[11])
P E.I.	After April 1, 2002 80% of net for first 38 weeks 85% of net after 38 weeks After Jan. 1, 1995:As above, but 39 weeks Before Jan. 1, 1995 75% of average gross earnings to ceiling in effect	$443.76 (80%) $471.50 (85%)	None
Quebec	90% of weighted net income[1]	$718.96	$223.50
Sask.	On or After Sept 1, 1985: 90% of net[12] (with max. wage base of $51,900 effective January 1, 2003) Prior to Sept 1, 1985: 75% of gross (with max. wage base of $49,000)	$675.99 $706.73	$303.33 or 100% gross earnings if less
Yukon	75% of gross earnings[12]	$952.21	$306.88[12]

[1] 90% of net earnings arrived at after deductions for E.I., CPP (QPP in Quebec) and Income Tax.

[2] For a worker with a dependant spouse and two children.

[3] For accidents that occur in 2003.

[4] Applies to a worker who does not have probable tax deductions for support payments and child care expenses. Manitoba's minimum wage increased from $6.50 to $6.75 per hour effective April 1, 2003. On this date the minimum weekly payment increased to $228.37.

[5] For accidents that occurred in 1991.

[6] There is no absolute minimum payable as all awards are at 90% of net earnings. Minimum shown is based on minimum wage earner with a dependent spouse and two children.

[7] For accidents that occurred after June 30, 1989 and before July 1, 1991. For accidents that occurred after June 30, 1991 and before January 1, 1992, the minimum weekly payment is $255.68. Where the worker's average earnings are below these respective levels, benefit levels will equal average earnings. For accidents that occurred prior to July 1, 1989, the minimum weekly payment is $255.68.

[8] Loss of earnings is defined as average net earnings minus net estimated capable earnings.

[9] For a worker with a spouse. Number of dependants not applicable. NWT also based on a northern resident.

[10] For a worker with a TD1 code of '5'.

[11] (MF) = Modified Friedland; (C) = CPI.

[12] If the worker's earnings from employment are less than $16,000 per annum, the worker is paid 100% of gross. The threshold is based on a worker who is totally disabled and full-time employed (40 hours per week).

TABLE 12: WEEKLY BENEFITS FOR TEMPORARY DISABILITY – SUMMARY – 2005

Juris-diction	% of earnings	Maximum weekly payments	Minimum weekly payments
AB	90% of net earnings[1] Accidents on or after April 1, 2003 Accidents before April 1, 2003	$784.60 $795.66	$272.79 or 100% of net earnings if less $272.79 or 100% of net earnings if less
BC	90% of net earnings	$793.60[2]	$326.25 or 100% of earnings if less
MB	After Dec. 31, 1991: 90% of net average earnings[1] 80% of net after 24 months of cumulative benefits Before Jan. 1, 1992: 75% of average gross earnings	$714.47[3,4,5] $706.13[6]	$236.79 or 90% of net earnings[4,5,7] $242.61[8]
NB	85% of loss of earnings[9]	Single $590.07 Married $618.76	None
NL	80% of net earnings	Single $501.33 Married $526.01[10]	None
NT/NU	90% of net earnings[1]	$967.22[10]	$420.86 or 100% of net earnings if less
NS	75% of net earnings for the first 26 weeks 85% of net earnings thereafter	$479.72[11] $543.69[11]	None
ON	After Jan. 1/98: 85% of net average earnings Prior to Jan. 1/98: - 90% of net average earnings Prior to April 1, 1985 – 75% of gross earnings	$868.36 (MF[12]) $868.36 (C[12]) Maximum varies (C[13]) $584.14 (MF[12]) $702.41(C[12])	$298.62 (MF[12]) $357.43 (C[12]) Minimum varies (C[13]) $278.88 (MF[12]) $333.81 (C[12])
PE	After April 1, 2002: 80% of net for first 38 weeks 85% of net after 38 weeks After Jan. 1, 1995: As above, but 39 weeks Before Jan. 1, 1995: 75% of average gross earnings to ceiling in effect	$469.47 (80%)[14] $499.81 (85%)[14]	None
QC	90% of weighted net income[1]	$704.07	$231.53
SK	On or After Sept 1, 1985: 90% of net[1,3] (with max. wage base of $55,000 effective January 1, 2005) Prior to Sept 1, 1985: 75% of gross (with max. wage base of $52,000 effective January 1, 2005)	$673.66 $750.01	$324.98 or 100% gross earnings if less
YT	75% of gross earnings[15]	$963.69	None – under consideration

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[1] 90% of net earnings arrived at after deductions for E.I., CPP (QPP in Quebec) and Income Tax.

[2] This figure is a result of 90% net of the maximum wage rate ($61,300), including probable income tax, CPP and EI deductions).

[3] For a worker with a dependant spouse and two children.

[4] For accidents that occur in 2005.

[5] Applies to a worker who does not have probable tax deductions for support payments and child care expenses. Manitoba's minimum wage increased from $7.00 to $7.25 per hour effective April 1, 2005. On this date the minimum weekly payment increased to $245.16.

[6] For accidents that occurred in 1991.

[7] There is no absolute minimum payable as all awards are at 90% of net earnings. Minimum shown is based on minimum wage earner with a dependent spouse and two children.

[8] For accidents that occurred after June 30, 1989 and before July 1, 1991. For accidents that occurred after June 30, 1991 and before January 1, 1992, the minimum weekly payment is $265.82. Where the worker's average earnings are below these respective levels, benefit levels will equal average earnings. For accidents that occurred prior to July 1, 1989, the minimum weekly payment is $265.82.

[9] Loss of earnings is defined as average net earnings minus net estimated capable earnings.

[10] For a worker with a spouse. Number of dependants not applicable. NWT also based on a northern resident.

[11] For a worker with a TD1 code of '5'.

[12] (MF) = Modified Friedland; (C) = CPI. Net Exemption Code X. See Ontario narrative for more details.

[13] Maximum/minimum varies dependent on the accident date.

[14] For a worker with a TD1 code of "1"

[15] 100% of gross if annual earnings are less than $16,000.

Appendix B: Summary of Experience Rating Programs in Canada

Source, Workers' Compensation Industry Classifications, assessment Rates, and Experience Rating Programs in Canada 2003, Association of Workers' Compensation Boards of Canada

TABLE IX
SUMMARY OF EXPERIENCE RATING PROGRAMS IN CANADA

	YR[1]	TITLE	ELIGIBILITY	EFFECT	BALANCE	SURCHARGE/ REBATE SPREAD
B.C.	2000	Experience Rating Plan	All employers	prospective	balanced	Maximum 50% discount to maximum 100% surcharge on base assessment rate.
Alta.	2000	Partners in Injury Reduction	All employers	retrospective	not balanced	-Refunds only. -Up to 20% refunds based on achieving a COR and improved performance.
	1998	Experience Rating Plan for Large Employers	Employers with industry rate premiums of at least $15,000 over 3 year period.	prospective	not balanced	-Up to 40% discount or surcharge on industry rate.
	1998	Experience Rating Plan for Small Employers	Employers with industry rate premiums less than $15,000 over a 3 year period.	prospective	not balanced	5% discount if no lost time claims in 5 year period; 5% surcharge if 5 or more lost time claims in 5 year period; no discount if 1 - 4 lost time claims or if less than 5 years of history.
	1998	Poor Performance Surcharge	Employers in Experience Rating for Large Employers at maximum surcharge for 2 or more years.	prospective	not balanced	-Surcharge only up to 40%.
Sask.	1992	Merit/Surcharge Program	Employers must be active for the last year for surcharge and the last 3 yrs. for merit, with annual premiums of min. $50.00	retrospective	not balanced	Merit - up to 25% refund of average premiums. Surcharge - up to 40% additional charges of average premiums.
Man.	1989	Experience Sensitive Rating	All employers except individually liable employers.	prospective	balanced	Plus 120% or minus 40% from the category base rate[2].
Ont.	1984	CAD-7 [3]	Construction industry.	retrospective	balanced over time	80%-40% of premium.
	1984	New Experimental Experience Rating (NEER)	All industries except construction.	retrospective	balanced over time.	90%-10% of premium.
	1989	Workwell Program	All employers except those individually liable.	retrospective	not balanced	10-75% of assessment to a maximum of $100,000.
	1997	Safe Communities Incentive Program (SCIP)	Employers paying up to $90,000 in annual WCB premiums.	retrospective	not balanced	Refund only; 75% of cost savings realized.
	1998	Merit Adjusted Premium (MAP) Program	All employers paying premiums of $1,000 to $25,000 annually.	prospective	balanced	Maximum premium decrease of 10%. Maximum premium increase of 50%.
Que.	1998	Mutual Prevention Group	Same as 1990 personalized plan applicable to employers of the group considered as a whole.	prospective	balanced	200%[4] / 100% of the risk-related part of the base assessment.
	1990	Personalized Plan	Expected cost of the three years of experience of the first-level exceeding $1,050[4].	prospective	balanced	200% / 100% of the risk-related part of the base assessment.
	1990	Retrospective Plan	Qualification threshold of the basic test: 2001 insurable payroll x risk-related part of unit rate exceeding $231,200[5].	retrospective	not yearly balanced (but appropriately considered by the funding policy	50% - 100%[5] of base assessment.

TABLE IX
SUMMARY OF EXPERIENCE RATING PROGRAMS IN CANADA - Cont.

	YR[1]	TITLE	ELIGIBILITY	EFFECT	BALANCE	SURCHARGE/ REBATE SPREAD
N.B.	1990	Experience Rating System	Employers with premiums of at least $3,000 over a 3yr.period.	prospective	balanced	40%-40% of base assessment.
	1992	Enhanced Participation				Participation 25% plus 1% for each $500 of assessments over $1,000.
	1996	Enhanced Experience Rating System				Up to 40% rate reduction and up to 80% rate surcharge.
N.S.	1996	Experience Rating	All regularly classified employers. Special protection employers are not eligible.	prospective	balanced	The max. merit (decrease) in an employer's basic rate is 30% ; the max. demerit (increase) is 60%.
P.E.I.	1995	Experience Rating System – Pilot	Construction sectors with total premiums of at least $3,000 over a 3 year period.	prospective	balanced	Plus or minus 25% from the base rate.
	1996	Experience Rating System	Employers with total premiums of at least $3,000 over a 3 year period. Farming and Fishing industries are excluded.	prospective	balanced	Plus or minus 25% from the base rate.
NL	1989	Experience Rating Assessment Plan Pilot Project	Hospitals, nursing homes, and special care homes with total premiums of at least $3,000 over a 3 yr. period.	prospective	balanced	20% - 20% of base assessment rate.
	1995	Expanded Experience Rating Plan Mandatory for all eligible firms	All firms in an eligible rate code that have been active for the past three years and have paid a minimum of $3,000 in assessments over those three years (an average of $1,000 per year).	prospective	balanced	Maximum of 20% discount or 20% surcharge applied to the base rate.
	2002	Adjusted Experience Rating Plan	Same as 1995 Plan, but with industry groups replacing rate codes.	prospective	not balanced	Maximum of 20% discount or 40% surcharge applied to base rate[7].
Yukon	1992	Risk Reduction Merit Rebate Program. **Program Cancelled**	Employers with annual assessments of at least $500.	retro-spective	not balanced	Up to 30% rebate and up to 33% super-assessed.
	1997	Risk Reduction Merit Rebate **Program Cancelled**				Up to 33% super-assessed. **No experience Rating Programs in place in 2003.**
N.W.T. & Nunavut	1996	Safety Incentive and Rate Reduction (SIRR) **Program - Cancelled**	Employers with a 3 yr[4] average assessment over $1,000 and more than 2 time-loss claims within the 3 yr. period.* Special assessment must exceed $500 to be assessed.	retro-spective	not balanced	Special assessment limited to 40% of employer's 3 yr. average assessment - **PROGRAM CANCELLED**
	1999	Safety Incentive and Rate Reduction **Program Cancelled.**				**No experience Rating Programs in place in 2003.**

[1] Many WCBs had other experience rating programs or plans operating before those listed. P.E.I. had a program in the 1970s and early 1980s.

[2] Manitoba has not had a merit/surcharge program since 1997. Assessment rates for individual firms can vary by plus 40% or minus 120% from the category base rate.

[3] Council Amendment to Draft #7.

[4] Personalized rate of an employer based on risk cannot exceed thrice the rate of the unit based on risk.

[5] Based on the percentage of personalization of the employer and not applied to the uniform fixed rate.

[6] For new employers with less than three years of history, the actual period of operation will be used.

[7] Doubling of maximum surcharge was instituted for the 2002 rate setting year and continues for 2003 (a 20% maximum surcharge existed prior to 2002). The current experience rating program is not necessarily revenue neutral as a result.

Appendix C: Compilation of Definitions from Canadian Workers' Compensation Legislation

Comparison of Workers' Compensation Legislation in Canada 2004, Association of Workers' Compensation Boards of Canada

Definitions	Alberta	British Columbia	Manitoba	New Brunswick	Nfld & Labrador (NL)	NWT & Nunavut
Accident « accident du travail »	"accident" means an accident that arises out of and occurs in the course of employment in an industry to which this Act applies and includes (i) a wilful and intentional act, not being the act of the worker who suffers the accident, (ii) a chance event occasioned by a physical or natural cause, (iii) disablement, and (iv) a disabling or potentially disabling condition caused by an occupational disease;	"accident" includes a wilful and intentional act, not being the act of the worker, and also includes a fortuitous event occasioned by a physical or natural cause;	"accident" means a chance event occasioned by a physical or natural cause; and includes (a) a wilful and intentional act that is not the act of the worker, (b) any (i) event arising out of, and in the course of, employment, or (ii) thing that is done and the doing of which arises out of, and in the course of, employment, and (c) an occupational disease. and as a result of which a worker is injured; («accident»)	"accident" includes a wilful and intentional act, not being the act of a worker, and also includes a chance event occasioned by a physical or natural cause, as well as a disablement caused by an occupational disease and any other disablement arising out of and in the course of employment, but does not include the disablement of mental stress or a disablement caused by mental stress, other than as an acute reaction to a traumatic event;		"accident" includes (a) a fortuitous event occasioned by a physical or natural cause, (b) an event occasioned by a wilful and intentional act, and (c) disablement caused by an industrial disease arising out of and during the course of the employment of a worker;
Accident Fund « caisse des accidents »	"Accident Fund" means the fund referred to in section 91;	"accident fund" means the fund provided for the payment of compensation, outlays and expenses referred to in section 36;	"accident fund" means the fund provided for the payment of compensation, outlays, and expenses, under Part 1 of this Act; («Caisse des accidents»)	"Accident Fund" means the fund providing for the payment of compensation, outlays and expenses under Part I of the *Workers, Compensation Act* and administrative costs under this Act and the *Occupational Health and Safety Act*;	"injury fund" means the fund referred to in section 93;	"Accident Fund" means the fund established for the payment of compensation and other outlays and expenses authorized under this Act;
Alternative Employment « emploi équivalent »						
Appeals Commission or Appeals Tribunal « Commission d'appel ou tribunal d'appel »	"Appeals Commission" means the Appeals Commission established under section 10;	"appeal tribunal" means the Workers' Compensation Appeal Tribunal established under Part 4;	"appeal commission" means the Appeal Commission appointed under section 60.2; («Commission d'appel»)	"appeals tribunal" means the Appeals Tribunal established under the *Workplace Health, Safety and Compensation Commission Act*;		

Definitions	Nova Scotia	Ontario	Prince Edward Island	Quebec	Saskatchewan	Yukon
Accident	"accident" includes (i) a wilful and intentional act, not being the act of the worker claiming compensation, (ii) a chance event occasioned by a physical or natural cause, or (iii) disablement, including occupational disease, arising out of and in the course of employment, but does not include stress other than an acute reaction to a traumatic event;	"accident" includes, (a) a wilful and intentional act, not being the act of the worker, (b) a chance event occasioned by a physical or natural cause, and (c) disablement arising out of and in the course of employment ("accident")	"accident" means a chance event occasioned by a physical or natural cause, and includes (i) a wilful and intentional act that is not the act of the worker, (ii) any (A) event arising out of, and in the course of, employment, or (B) thing that is done and the doing of which arises out of, and in the course of, employment, and (iii) an occupational disease, and as a result of which a worker is injured;	"industrial accident" means a sudden and unforeseen event, attributable to any cause, which happens to a person, arising out of or in the course of his work and resulting in an employment injury to him;		
Accident Fund	"Accident Fund" means the fund provided for the payment of any compensation or other expenditures made pursuant to Part I;	"accident fund" maintained under the Workers' Compensation Act is continued as the "insurance fund". The insurance fund has the following purposes: (1) To pay benefits under the insurance plan to workers employed by Schedule 1 employers and to the survivors of deceased workers. (2) To pay the expenses of the board and the cost of administering the Act. (3) To pay such other costs as are directed under any Act to be paid by the board or out of the insurance fund.	"Accident Fund" means the fund provided for the payment of compensation, medical aid, outlays and expenses under Part I;		"fund" means the accident fund continued under section 116 as the Injury Fund;	
Alternative Employment			"Alternative Employment" means employment that is comparable, as determined by the Board, to the worker's pre-injury work in nature, earnings, qualifications, opportunities and other respects;	"equivalent employment" means employment of a similar nature to the employment held by the worker when he suffered the employment injury, from the standpoint of vocational qualifications required, wages, social benefits, duration and working conditions;		
Appeals Commission or Appeals Tribunal	"Appeals Tribunal" means the Workers' Compensation Appeals Tribunal established pursuant to this Act;	"Appeals Tribunal" means the Workplace Safety and Insurance Appeals Tribunal; ("Tribunal d'appel")	"Appeal Tribunal" means the Appeal Tribunal appointed under section 56;			

Definitions	**Alberta**	**British Columbia**	**Manitoba**	**New Brunswick**	**Nfld & Labrador (NL)**	**NWT & Nunavut**
Dependent Child « enfant à charge »	"dependent child/ means a dependent child who is under the age of 18 years;					
Director « administrateur »					"director" means a director of a corporation;	
Disability « incapacité »					"disability" means the loss of earning capacity of a worker as a result of an injury;	
Domestic « domestique »						
Earning Capacity « capacité à gagner sa vie »				"earning capacity", when used in reference to the time of or before the injury, means the earning capacity calculated in accordance with section 37, 38 or 48, as the case may be;		
Earnings and Wages « gains et salaire »					"earnings" includes a share or portion of proceeds or profits referred to in subparagraph (z)(i)	

Definitions	**Nova Scotia**	**Ontario**	**Prince Edward Island**	**Quebec**	**Saskatchewan**	**Yukon**
Dependent Child						
Director	"Director" means a member of the Board of Directors, and includes the Chair and the Deputy Chair of the Board;		"directors" means the chairperson and members of the Board appointed under section 19;			
Disability						"disability" in respect of a worker means a work-related incapacity, as determined by the board, including post-traumatic stress, a permanent impairment, or a worker's death;
Domestic				"domestic" means a natural person engaged by an individual for remuneration, whose main duty is, in the dwelling of the individual, (1) to do housework, or (2) to care for a child or a sick, handicapped or aged person and who lives in the dwelling;		
Earning Capacity						
Earnings and Wages		"earnings" or "wages" include any remuneration capable of being estimated in terms of money but does not include contributions made under section 25 for employment benefits; ("gains", "salaire")	"earnings" includes salary, wages, commissions, gratuities, earnings for overtime, piecework, contract work, bonuses, allowances, board and lodging capable of being estimated in terms of money, credits and any substitutes for money that are provided wholly at the expense of the employer;			"earnings" includes salary, wages, commissions, tips, remuneration for overtime, piece work and contract work, bonuses and allowances, the cash equivalent of board and lodging, store certificates, credits, directors fees, indemnities and allowances paid to members of the Legislative Assembly, and any substitute for money but does not include any amount received for expenses incurred by the worker by reason of the worker's employment;

Definitions	Alberta	British Columbia	Manitoba	New Brunswick	Nfld & Labrador (NL)	NWT & Nunavut
Industry « secteur d'activités »	"industry" means an establishment, undertaking, trade or business, whether it is carried on in conjunction with other occupations or separately;	"industry" includes establishment, undertaking, work, trade and business;	"industry" means an industry set out in section 73 or the regulations; («industrie»)	"industry" means the whole or any part of any industry, operation, undertaking or employment within the scope of this Part; and in the case of any industry, operation, undertaking or employment not as a whole within the scope of this Part means any department or part of such industry, operation, undertaking or employment as would, if carried on by itself, be within the scope of this Part;	"industry" includes the whole or a part of an industry, operation, undertaking, establishment, work, trade or business that is not excluded by section 38;	"industry" means an establishment, undertaking, work, trade or business to which this Act applies, whether it is carried on in conjunction with other occupations or separately;
Initial Payment Period « période initiale de paiement »		"initial payment period" means the period starting on the date of a worker's injury and ending on the last day of the 10th week for which compensation is payable under this Act to the worker for a temporary disability resulting from the injury;				
Injury « lésion »					"injury" means (i) an injury as a result of a chance event occasioned by a physical or natural cause, (ii) an injury as a result of a wilful and intentional act, not being the act of the worker, (iii) disablement, (iv) industrial disease, or (v) death as a result of an injury arising out of and in the course of employment and includes a recurrence of an injury and an aggravation of a pre-existing condition but does not include stress other than stress that is an acute reaction to a sodden and unexpected traumatic event: (2) Notwithstanding paragraph (1), stress that may be the result of an employer's decision or action relating to the employment of a worker including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment does not constitute an injury;	

Definitions	Nova Scotia	Ontario	Prince Edward Island	Quebec	Saskatchewan	Yukon
Industry		"industry" includes an establishment, undertaking, trade, business or service and, if domestics are employed, includes a household;	"industry" includes an establishment, undertaking, work, operation, trade or business;		"industry" means an industry to which this Act applies and includes establishment, undertaking, trade and business;	"industry" includes every establishment, undertaking, trade, or business in or being carried on in the Yukon except industries excluded by regulation;
Initial Payment Period						
Injury	"injury" means personal injury, but does not include any type or class of personal injury excluded by regulation pursuant to Section 10;				"injury" means: (i) the results of a wilful and intentional act, not being the act of the worker, (ii) the results of a chance event occasioned by a physical or natural cause; (ii.1) a disabling or potentially disabling condition caused by an occuapational disease; or (iii) any disablement, arising out of and in the course of employment;	